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MUSLIM PERSONAL LAW

(Outline Series)

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مرزا اسد اللہ خاں غالب

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Part I

THE BOOK OF *NIKĀḤ* (MARRIAGE)

CHAPTER 1

THE MEANING OF *NIKĀḤ*, FORMATION OF THE CONTRACT AND ITS CONDITIONS

فَمَالِ هٰؤُلَآءِ القَومِ لَا يَكَادُونَ يفقهون حَدِيثاً

What is wrong with these people that they fail to understand a simple statement (Qur'an 4 : 78)

1.1 Preliminary

1.1.1 The meaning of *nikāḥ*

The term *nikāḥ* in its literal sense means joining, ejaculation and sexual intercourse. This is the meaning in the verse الزَّانِي لَا يَنكِحُ إِلَّا زَانِيَةً, the meaning is: "It is only the *zānī* who has intercourse with the *zāniyyah*."[1] This literal meaning has an impact on certain legal rules. Al-Shāfi'ī believed that the word in its literal and *shar'ī* (legal) meaning applies to the contract of marriage alone. In its technical meaning, *nikāḥ* is a contract formed for granting *milk mut'ah* to the man over the woman, that is, ownership of physical access to the woman.

In the definition above, the term "woman" excludes marriage to a man, eunuch, and *jinn*. The word "man" should exclude "marriage" to the Qur'ān as is done unlawfully in some parts of Pakistan. The term "contract" excludes the literal meaning of *nikāh* as intercourse, because the contract of marriage is possible when the woman is in a state of menses or postnatal bleeding, while intercourse is not allowed in such a state. The term *milk* also implies that no ownership is established when there is a "legal obstacle," which is meant to exclude women in the prohibited categories.

The term *milk mut'ah* (enjoyment of exclusive physical access) is intended to distinguish it from *milk 'ayn*, which is ownership of the corpus itself as in the case of female slaves. As stated, the purpose of designating it as "ownership" is to indicate "exclusive physical access." The wife too has right of physical access to the husband, but such access is not "exclusive," because the husband can have more than one wife, while the wife cannot have more than one husband.

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[1] Qur'ān 24 : 3. It does not mean that the *zānī* will marry a *zāniyyah*, for many a womanizer is married to a decent woman. Thus, it is a *khabar* (report) and not a prohibition in this verse.

It is to be noted that permission of physical access to the woman does not mean that the husband can force the woman into having sex, thus resulting in what is called "marital rape." It is true that some later jurists have stated that the husband can compel his wife to have intercourse with him if there is no legal basis justifying her refusal. This view, however, cannot be justified. Marriage is a bundle of rights that are available on the basis of partnership (*sharikah*). The wife has a right to demand sex from the husband, and the husband likewise has a right to demand sex from his wife, but this is done on the basis of partnership and participation. The element of force does not come into this. Force is only possible in the case of slavery, and it is for this reason that Islamic law does not permit marriage between a man and his slave girl, because the prior ownership that is coercive prevents the form of "ownership" prescribed for marriage, and which is based upon participation. Those who argue on the basis of the verse, "Your wives are as a tilth unto you," [Qur'ān 2:222] should know that "tilth" cannot be approached when it is not ready or not willing to participate. Beating the wife into submission is not allowed. In addition, to this "tilth" also means "as commanded by Allah," that is through the vagina, and unnatural sex is not permitted. Tilth is meant for the production of offspring and this is only possible through the natural and lawful manner permitted and prescribed by Allah.

1.1.2 Marriage is recommended

Marriage is recommended under normal circumstances, but may become obligatory or merely permitted depending upon the state of the individual. The general rule accepted by the Ḥanafī jurists and by many others is that marrying is a *sunnah*. Al-Sarakhsī maintains that the Prophet (pbuh) mentioned the obligations from among the *arkān* (pillars) of *Dīn*, elaborating these obligations, and he did not mention *nikāḥ* as one of them. Further, some of the Companions (God be pleased with them) did not marry and he (pbuh) did not disapprove their act. The Companions (God be pleased with them) also elaborated the obligations when they spread out in the lands they had conquered, but did not mention *nikāḥ* as an obligation. He argues that just as *zinā* can be avoided through *nikāḥ* (because of which some consider it an obligation), it can be avoided with fasting. The Ẓāhirīs, state that it is a universal obligation like fasting and prayer as well as other universal obligations, so that one who relinquishes it, while having the ability to pay the dower and maintenance and to undertake intercourse, commits a sin.

It is, however, necessary to distinguish two situations. First, marriage is a definitive obligation (*farḍ*) for the one who finds himself in a state of uncontrollable carnal desire. Thus, one who finds himself drawn to sexual intercourse, finds it is difficult to exercise restraint in staying away from it, when he has the ability to pay the dower and maintenance, and he is not already married, commits a sin (by not marrying). In the second case, where the person is not overwhelmed by desire, marriage is recommended.

Al-Shāfiʻī said that marriage is permissible (*mubāḥ*), like sale and purchase. Further, the contract of marriage is a means through which the satisfaction of desire is attained, therefore, it is permissible like buying a slave girl. In fact, it is just like eating and drinking in which a benefit is sought, but the seeking of this benefit is permissible, not prescribed. Al-Shāfiʻī concluded that devoted worship is better than marriage, for marriage is one category of the *muʻāmalāt* (transactions). This does not apply to the person who cannot control his carnal desire. Samarqandī says that in our (Ḥanafī) view, marrying along with the performance of definitive obligations and *sunan* is better than not marrying for the performance of supererogatory prayers. This, he says, is the well known issue of seclusion for worship. The rule that it is recommended and preferred with the status of a *sunnah*, leads to the conclusion that marrying is preferable to total occupation with supererogatory worship (*nawāfil*). A tradition says, "Marriage is my *sunnah*, thus, he who deviates from my *sunnah* does not belong to my people."[2] As the *sunnah* is prior to *nawāfil*, marriage comes before supererogatry worship.

1.1.3 The objective of the contract

The contract of marriage is intended to secure the interests of this world—including the protection of women and procreation—and the interests of the next world. A number of interests pertaining to this world and the next are associated with this contract. Among these is the protection of women, taking care of them and spending on them. Among these is also protection against unlawful sexual activity. It is a means for the increase in the human population and the *ummah*. The Prophet (pbuh) is reported to have said, "Marry, reproduce and increase in numbers," and he said, "I wish to see you outnumer the nations." It is a basis for the survival of this world till the day of judgement, and this is only possible through reproduction. Reproduction is only possible through intercourse, therefore, the Almighty has made the marriage contract a means for doing so. The marriage contract is recommended, because without it there is uncertainty about parentage and it leads to the ruination of children. Finally, women find it difficult to earn and spend on children, therefore, the marriage contract becomes the means for the imposition of duties on the father. Sarakhsī points out that the purpose of this contract is not the satisfaction of lust, as those who deem it *mubāḥ* assert,[3] rather the purpose is the securing of the interests mentioned above. Nevertheless, the satisfaction of desire too has been associated with it.

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[2] It is recorded by Ibn Mājah and al-Bayhaqī.

1.1.4 Marriages across school boundaries

Marriages across school boundaries take place and are a fact of life. The same applies to all contracts and transactions. The courts in the Sub-Continent have held that in case of a dispute arising out of a marriage in which the husband and wife belong to different "sects," the rules of the sect of the defendant will apply.[4] "There can be no doubt that justice, equity and good conscience require that the question of the validity of the alleged marriage must be determined according to the personal law of the defendant, that is, the Shiah Law."[5] The statement clearly shows that the rule of following the defendant's law in case of marriage is based upon "justice, equity and good conscience," which basically means the principles and concept of justice of the English common law. This is not a valid basis for determining rules for Islamic law, nor can it be called "*ijtihād*" as some may assume.

This rule leads to uncertainty as the husband and wife can never be clear about their respective duties, and also about which law will apply when they disagree, when such knowledge is essential for the proper functioning of marriage and is not a question of always settling matters in court. Marriage is a contract and should be treated like all other conctracts. Consequently, the law to be applied for disputes that come before courts and for determining the duties of the spouses should be the law of the school under which the contract has been concluded. The law of the school must be identified at the time of the contract whether the marriage is solemnised by a registrar or by the civil court.

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[3] As does al-Shāfi'ī above.

[4] This rule was settled in *Aziz Bano v. Ali Muhammad Ibrahim*, AIR (1925) Allahabad, at 720. The term "sect" in this case is inappropriate; the schools of law are not sects.

[5] *Aziz Bano v. Mohammad Ibrahim Husain*, 89 Ind Cas 690, at para. 5.

There are different schools within the Shi'ahs and also within the Sunnīs, and inter-marriages can adopt different forms. The above rule should be followed not only where the marriage is between a Shi'ah and Sunni, but also when it takes place, for example, between a Ḥanafī and a Shāfi'ī. Following the law under which the marriage contract is concluded will not amount to changing one's school and each spouse can continue to follow his or her school for all matters other than marriage and divorce.

1.1.5 Initiating the proposal of marriage and looking at the woman prior to proposal; the promise to marry

It is customary to obtain the informal consent of the parties to the contract and their families prior to marriage. An informal proposal in such meetings is called the *khiṭbah* (خطبة).[6] Initiating a proposal, while the proposal of another man is pending is disapproved, but it does not make the final contract of marriage, concluded after such violation, irregular or void. The deciding factor in distinguishing between a regular contract of marriage is that the *khiṭbah* (initial proposal) implies a contract in the "future" and the marriage contract requires a form that refers to the "past."

It is permitted to look at the woman prior to the initiation of the informal proposal, even when the man looks at the woman with lust. When Mughīrah ibn Shu'bah (God be pleased with him) wished to marry some woman the Prophet (pbuh) said to him, "Go and look at her." The tradition is reported in a number of sound compilations under the heading of *nikāḥ*. The words of the tradition indicate unqualified permission and make it obvious that the purpose is to assess compatibility and inclination between the couple. In this case of necessity, it is even permitted to look at the woman even if it is accompanied by lust. As far as the woman is concerned there is no restriction on her except that she has to keep her modesty intact.

Mere promises (called *wa'd*) are generally not acknowledged in Islamic law; in those few cases that they are acknowledged, they render the contract *ghayr lāzim* (non-binding or terminable), that is, not binding or enforceable. A promise to marry is, therefore, not enforceable, and a suit for breach of promise to marry does not lie. Recovery of gifts or presents exchanged, at the pre-nuptial stage, will depend upon the facts of each case and whether such property exchanged was by way of a revocable gift. After the conclusion of the actual contract of marriage the gifts do not become a part of the dower (*mahr*). In fact, a gift made to a wife is irrevocable (see section on gifts).

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[6] See Qur'ān 2:235 for the meaning of the word.

In some cases, a stipulation may be made requiring certain payments or the rendering of services in exchange for a promise to marry. For example, a woman may say, "Pay ten thousand to my father and then I will marry you." In such a case, if the marriage takes place the woman will be entitled to reasonable dower, whether or not the husband has paid the amount to her father. If he has made a gift of the amount to her father, the husband is entitled to revoke the gift.[7] In other words, the customary practice in certain areas of "selling daughters" is not valid. The narration from the *Ẓāhir al-Riwāyah* does not permit the stipulation of rendering some service by the future husband. Some later jurists argue on the basis of the case of Moses (pbuh), and Shu'ayab (pbuh), when he was asked to serve for eight years. They maintain that this is law for us and valid *shar' man qablana* or law of the earlier scriptures. The view in the school, however, is that if the husband performs the required service, he is entitled to "reasonable wages" whether the marriage takes place or is refused.

The conclusion is that a suit for "damages" for breach of promise to marry will not lie under any circumstances, even when one party has taken some steps, required or otherwise, as a result of the promise.

1.1.6 Essence of contracts of marriage and their classification as valid, void and irregular

All contracts, whether of marriage or others, are divided into two constituent parts: the *aṣl* (foundation) and the *waṣf* (external attribute). The *aṣl* or foundation includes the *rukn* (pillar or essential element) and *sharā'iṭ* (conditions) that are intrinsic to the *aṣl*. A violation of such conditions demolishes the *aṣl*. Usually, the contract cannot be rectified if an essential condition is violated. The *waṣf* includes external attributes and conditions that are intrinsic to the *waṣf*. A violation of such conditions may demolish the *waṣf*, but will leave the *aṣl* intact. Usually, the contract can be rectified if a condition related to the external attribute is violated. On the basis of the *aṣl* and *waṣf*, contracts of marriage are of three types:

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[7] The issue is related to what is called *shighār*, which is discussed below.

ṣaḥīḥ (valid, صحيح); *bāṭil* (void, باطل); and *fāsid* (irregular or vitiated, فاسد).

The valid or *ṣaḥīḥ* contract is one in which the *aṣl* and *waṣf* are both in order, that is, the *rukn*, essential conditions and additional conditions are all in order. This type of contract has full legal effects.

The void or *bāṭil* contract is one in which the *aṣl* is defective, that is, there is a defect in the *rukn* or an essential condition. This type of contract has no legal effects.

The irregular or *fāsid* contract is one in which the *aṣl* is in order, but the *waṣf* is defective, that is, the *rukn* and essential conditions are in order, but one or more additional conditions are defective. This type of contract has some legal effects, especially after consummation, but for the rest the offending factor acts as an obstacle. In most cases such a contract can be rectified by removing the offending factor. (For the complete meaning of "legal effects" see Chapter on "Legal Effects" at page 67).

According to some, an example of a true *fāsid* (irregular) contract is one for *ḥalālah* where it is stipulated in the contract that the husband will grant divorce to enable remarriage with the first husband. It is maintained by others that this contract is valid and it is the stipulation (of granting divorce) that is *fāsid*, which is ignored.

IRREGULAR DUE TO *SHUBHAH* (MISTAKE).—It is crucial to note that in marriage contracts a contract that is void may still be classified as irregular (*fāsid*) on account of *shubhah* (doubt, mistake), which is usually called *shubhah fi'l-'aqd* (doubt or mistake in the contract). In such cases, the contract is assigned legal effects similar to the irregular contract even though the contract is essentially void, but the legal effects flow from the *shubhah* rather than the contract as the contract does not exist. Most contracts of marriage that are considered irregular by the jurists fall in this category. One of the main purposes of the irregular (*fāsid*) contract is to protect parties to the contract of marriage who mistakenly fall into a situation where they can be acused of unlawful sexual intercourse (*zinā*) and be subjected to *ḥadd*. In other obvious cases, the Ḥanafī system follows the rule that ignorance of law is no excuse, therefore, the accusation of *zinā* may follow. This category of irregular contracts has been a source of considerable confusion in the writings of later jurists[8] and hence some modern writers.[9] For a list of such contracts see section 5.1.3 on page 67.

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[8] The confusion exists in law cases as well. See for example, *Shezad Begum v. Abdul Hamid*, PLD 1950 Lah. 504; *Bagh Ali v. Anisa*, PLD 1968 Lah. 1216.

The Mālikī, Shāfi'ī, Ḥanbalī and the Shi'ah do not follow the threefold classification. Contracts are either valid or void, that is, *ṣaḥīḥ* or *bāṭil*.[10] The essential conditions are part of the *rukn* in their view. Nevertheless, some of these schools invoke the element of mistake into these contracts to waive the *ḥadd*, but this is the same thing as *shubhah* under the Ḥanafī system.

1.2 Essential Element (Rukn) and its Conditions

1.2.1 The essential element (*rukn*) of the contract of marriage

There is a single essential element of the contract of marriage (*rukn* of *nikāḥ*) called the *ṣīghah* (offer and acceptance) where offer and acceptance are expressed in the usual technical terms or in terms that convey the meaning of marriage. The offer is called *ījāb* and acceptance is called *qabūl*. Offer and acceptance are both expressed in the past tense, or the offer may convey the future tense and the acceptance the past tense.

Offer and acceptance are expressed directly by the parties to the contract or by their agents or messengers. The parties to the contract, or their agents, must hear each other expressing the offer or acceptance as the case may be. The witnesses must hear both parties. The same purpose may be served by a letter that is witnessed. The contract of marriage may be concluded through an agent or even through letter. The legal basis for permission of agency is the marriage of the Prophet (pbuh) to Umm Ḥabībah (God be pleased with her).[11] Marriage is also concluded, in the case of a dumb person, through a gesture or indication when these are meaningful. A (witnessed) letter is treated as an offer from one absent, but the letter has to be read out in the presence of witnesses and acceptance has to be issued in the same session of the contract (see below).

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[9] See Mulla's Code, for example, in particular §§253, 244, 247, 249, 255. See also Tanzilur Rahman, *A Code of Muslim Personal Law*, vol. 1, 76-83, 105.

[10] This should technically mean that *hadd* is to be awarded for all cases that are deemed to be irregular in the Ḥanafī school. Of course, Imām Mālik does not require witnesses for the validity of the contract but a public proclamation.

[11] It is recorded by al-Ḥākam in *al-Mustadrak*, vol. 4, 22, and by Aḥmad in his *Musnad*, vol. 6, 427.

A person who possesses authority (*wilāyah*) over both parties (both being minor), that is, authority granted by the *sharī'ah*, may express offer and acceptance for both parties (See condition of *wilāyah* below).

The offer may be withdrawn prior to the issuance of the acceptance, but the acceptance in order to be valid has to be expressed in the same session (*majlis*) in which the offer was expressed.

If an option of any kind is stipulated in the contract of marriage, the option is void, but the contract is valid.

The modern requirement for the parties to append their signature to the written marriage contract, which is then registered, does not render the provisions in clauses (2) to (5) redundant, and may be treated as an additional requirement imposed by the state. A contract concluded without such additional formalities is not void.

1.2.2 Conditions of the essential element (or impediments to marriage) and their types

Conditions of the essential element are of three types: conditions for the formation (*in'iqād*) of the contract; conditions for the validity (*jawāz*) and performance (*nifādh*) of the contract; and conditions that make the contract non-binding. Most of the conditions of the first two types render the contract void if they are not met, although some of the contracts may be declared irregular due to *shubhah*. In addition to these, there are certain conditions imposed by the State of Pakistan that do not affect the validity of the contract but may entail criminal and financial liability.

The first two types are listed below, while the third type, that is, conditions that make the contract non-binding are discussed later. For the additional conditions imposed by the State of Pakistan, see section 1.4.1 on page 45.

(*a*) That the statement of offer and acceptance must be made by a person who is major (*bāligh*) and sane. (See §1.3.1)

(*b*) That the validity of the contract of marriage is not affected if offer and acceptance are based on involuntary statements, are given under coercion or are made in jest. (See §1.3.3)

(*c*) That the requirements of *wilāyah* (legal authority granted by the *sharī'ah*), if applicable, must be met. (See §1.3.4) (*d*) That proportionality of status (*kafā'ah*) must be observed in a marriage agreed to by one other than a father or grandfather. (See §1.3.5)

(*e*) That the requirements of witnesses must be met. (See §1.3.6)

(*f*) That the woman (bride) must be one who can be lawfully married to the man. (See §1.3.8)

(*g*) That the marriage concluded should not result in combining two *dhawātu 'l-arhām* or in admitting a fifth wife. (See §1.3.9)

(*h*) That the woman marrying should not be married to another. (See §1.3.10)

(*i*) That the woman marrying should not be in her waiting period (*'iddah*). (See §1.3.11)

(*j*) That the woman marrying should not "be with child" of established paternity. (See §1.3.12)

(*k*) That the parties should be affiliated with some *millah* (faith). (See §1.3.13)

(*l*) That the bride (woman) should not be a polytheist where the groom (man) is a Muslim. (See §1.3.14)

(*m*) That the groom (man) must be a Muslim where the bride (woman) is a Muslim. (See §1.3.15)

(*n*) That the contract must be intended as a perpetual contract; the contract for a temporary marriage is not permitted. Shī'ah law permits *mut'ah*. (See §§1.3.16–1.3.17)

(*o*) That the contract must be concluded with *mahr* (dower). (See §§2.1.1–2.3.3 starting on page 47)

(*p*) That a marriage valid for Muslims, which meets all the conditions of validity described above, is valid for the Dhimmīs (non-Muslim citizens) and Ḥarbīs (enemies residing within the Muslim state) as well. (See sections 4.1 and 4.2 starting on page 65)

Most of the above conditions constitute impediments to marriage, that is, marriage is not valid unless the conditions are met. The following conditions do not apply under the present circumstances, as they are about slavery:—

(*a*) That the party to the contract should be a free person (pertains to slavery).

(*b*) That on marrying a slave-girl there should not exist a wife who is a freewoman.

(*c*) That one of the parties to the contract should not be owned by the other party.

(*d*) That the married slave woman will acquire an option to terminate her contract of marriage if she is emancipated by her master (option on freedom).

1.3 *Impediments to Marriage or Conditions in Detail*

1.3.1 Legal Capacity

Offer and acceptance must be expressed by a person who is a major and is sane, and the parties to the contract must be present in the same session of the contract, either themselves or through authorised agents. Offer and acceptance made by an infant and an insane person, who cannot understand the meaning of their statements, are not valid. A contract based on such statements does not come into existence at all.

A person becomes a major on attaining puberty. In the absence of proof of puberty, the age of majority is presumed at the age of seventeen for a girl and eighteen for a boy, according to Abū Ḥanīfah. Puberty is presumed according to the majority of the jurists at the age of fifteen for both girls and boys.

Puberty is not a condition for the formation of the contract, and an offer or acceptance expressed by a discriminating minor (*sabī mumayyaz*) is deemed valid for the formation of the marriage contract, but is subject to ratification by the *walī*, that is, a person who has been given authority over the minor by the *sharī'ah*.

The parties to the contract must be present at the time of the contract either themselves or through their agents or messengers. The contract of marriage is not concluded when one of the parties is absent (with no one to express the offer or acceptance). The acceptance may be delayed somewhat after the offer is made, but must be issued within the same session (location) of the contract.

1.3.2 Offer and acceptance may be expressed by an agent (*wakīl*)

A marriage contract may be concluded through an agent whether for one party or for both parties. In certain circumstances it has become a necessity for a woman as she does not come out in session of males where the *nikāḥ* is being performed. Witnesses for the agency itself are not required.

An agent in a marriage contract is different from an agent in other contracts, like sale, insofar as he is not responsible for the performance of the contract. In a marriage contract, the agent is more like an ambassador or one who expresses the offer or acceptance on behalf of the party to the contract.

If one of the parties is not present[12] and the contract is concluded by means of a messenger the contract is valid if the letter is read out to the other party in the presence of witnesses and the acceptance is issued in the presence of such witnesses.

A contract of marriage made by an unauthorised agent (*fuḍūlī*) acting on behalf of both parties, when the parties are absent from the session, is not concluded even if such a contract is ratified later by both parties. If two unauthorised agents, one acting for the groom and the other for the bride, enter into a contract of marriage for the parties, the contract is valid if it is ratified by the parties.

1.3.3 Offer or acceptance made in jest, under coercion, by mistake, or when in a state of *iḥrām* does not prevent the conclusion of a valid marriage contract

Making voluntary and intentional statements is not a condition for the validity of the marriage contract. Offer or acceptance by a sane person, who possesses the legal capacity to enter into a marriage contract, does not prevent the conclusion of a valid marriage contract even when the statement is made under coercion, by way of jest, or by mistake. The basis for this is a tradition from the Prophet (pbuh): ثلاث جدّهنّ جدّ وهزلهنّ جدّ: الطلاق والعتاق والزّواج. "Three things done seriously are taken seriously and if done in jest are taken seriously: divorce; emancipation of a slave; and marriage."[13]

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[12] Like someone in a different country.

[13] It is recorded by Abū Dāwūd, *Sunan*, vol. 2, 265-66, Tr. No. 2194. It is also recorded by others.

A valid marriage contract can be concluded between a man and a woman when either one of them or both are in a state of *iḥrām* with the condition that marriage will be consummated after the ritual state of *iḥram* has ended. The same applies to a marriage contract concluded when the woman is undergoing her menstrual period or is passing through the postnatal period.

1.3.4 The requirements of *wilāyah* are necessary in certain cases

The *walī* is a person who has been granted authority over the person and the property of the minor by the *sharī'ah*. A guardian is a person appointed by the *walī* and is called a *waṣī* (guardian). In the absence of a *walī* or *waṣī*, the court may appoint a *waṣī* (guardian). Some modern writers refer to the *walī* as guardian, and to the *waṣī* as executor, which is not correct according to traditional Islamic law.

In relation to the contract of marriage, *wilāyah* is of four types: *wilāyat al-milk* (authority over slaves); *wilāyat al-qarābah* (authority over relatives); *wilāyat al-walā'* (authority over freed slaves); and *wilāyat al-imāmah* (authority of the court). In the present times, it is only *wilāyat al-qarābah* (authority over relatives) and *wilāyat al-imāmah* (authority of the court) that are relevant.

In *wilāyat al-qarābah* (authority over relatives), the *walī* must be a major, sane and one who can inherit from the ward; he need not be a residuary. Being a residuary is not a condition, but a basis for priority. An apostate or a non-Muslim cannot be the *walī* of a Muslim nor can a Muslim be a *walī* of a non-Muslim.

Wilāyah with respect to the nature of authority is of three types: complete autonomy for the ward; complete autonomy for the *walī*; authority shared between the *walī* and the ward. Where the ward has complete autonomy, it is recommended that he or she consult the *walī*.

The minor, male or female, is subject to the absolute authority of the *walī*, whether the female is a virgin or is deflowered. The *walī* also has authority over the marriage of the insane person, minor or major. The authority of the *walī* in this case is obligatory, mandatory and autonomous. The authority available to the *walī* in this context belongs not only to the father and grandfather, but to other *awliyā'* as well, however, in the latter case the minors possess the option of puberty. For the option of puberty, see section on "Conditions That Make the Contract Non-binding" on page 59.

If a father gives away in marriage his daughter, who has attained puberty and is a virgin, and she remains silent (or laughs) when the information reaches her, the contract is valid with her silence amounting to consent, but if she refuses and rejects the contract, it becomes void. If the deflowered female, who is a major, is married without her express consent by the *walī*, the contract is not valid. Her silence is not to be taken as her consent. Consent in such cases requires consenting to the husband, who has to be named, and the amount of dower, which also has to be clearly mentioned.

If a sane and major freewoman concludes her own contract of marriage, or appoints an agent for the purpose, or is married away by an unauthorised agent and she ratifies it, the contract is valid.

The rules for *wilāyah* and *wiṣāyah* regarding authority of the *walī* over the property of the minor are not part of personal law and are found in the Book of *Bay'* (Exchange), but we have discussed them in the last part on common rules. The description here must be added to that topic to complete the discussion about guardianship over person and property.

1.3.5 Proportionality of status (*kafā'ah*) must be ensured in a marriage agreed to by one other than a father or grandfather

Marriage is not a trade as it is not an exchange of wealth for wealth, even though it may be considered an exchange of wealth for a relationship. The *walī*, or the *waṣī* (guardian), has to keep the welfare of the ward in view, because his authority does not extend to the causing of harm to the ward.

To ensure the welfare of the minor, proportionality of status and reasonableness of dower are required, so that the interests of both parties are preserved. Jurists are reluctant to permit contracts where the amount of dower gives the impression of cheating, whether less or more, to the people in general. Some jurists permit the father and the grandfather to vary proportionality of status and amount of dower in consideration of the concealed benefits, known only to them, in the interest of the minor. This permission is not extended to other *walīs* like the brother, uncle and so on, who have to ensure proportionality of status (*kafā'ah*) in all cases where minors are involved.

The issue of proportionality and dower in the case of a girl who is a major and sane is discussed in the Chapter on "Conditions That Make the Contract Non-binding" on page 59.

1.3.6 Two witnesses must be present at the time of the contract

The contract of marriage must be witnessed by two male witnesses or by one male and two female witnesses, who must hear the offer and acceptance. This is a condition for the validity of the contract. The witness must be sane, a major and a free person. The contract cannot be witnessed by the insane, minors and slaves, thus, the witness must be a person who has authority to conclude his own contract of marriage.

The witness must be a Muslim when he is witnessing a contract of marriage between a Muslim male and a Muslim female. A contract of marriage between Muslims cannot be witnessed by an unbeliever, because an unbeliever does not have the authority of *wilāyah* over Muslims. If a judge validates the witnessing of such a contract by an unbeliever, his judgement is void.

If a Muslim male is marrying a *dhimmiyyah* (non-Muslim resident woman), the contract can be witnessed by two *dhimmīs* whether they profess the same faith as the woman or a different faith. This is the opinion of Abū Ḥanīfah and Abū Yūsuf. Muḥammad says that they are not eligible witnesses. A contract of marriage between two unbelievers can be witnessed by two unbelievers.

Moral probity (*'adālah*) is not a condition for the witness, and the contract can be witnessed by a *fāsiq* (disobedient person). Sight is not a condition for the witness, but the witness, if blind, must hear the offer and acceptance being pronounced.

The time of witnessing is not the time of ratification, but the time when the statements of offer and acceptance are issued, because offer and acceptance are the components of the essential element and not ratification. Ratification is the condition of performance.

Contract void or irregular: It is stated in some sources that a contract without witnesses is irregular (*fāsid*). In actual fact, a marriage contract without the presence of two witnesses is void, as their absence demolishes the essential element of the contract, nor can the contract be rectified. This is based upon a tradition that "there is no *nikāḥ* without witnesses." The contract, however, is treated like an irregular contract for some legal effects. *Ḥadd* of *zinā* is not implemented in this case due to *shubhah*. Paternity of a child born as a result of this agreement is also established due to the same reason.

1.3.7 Where marriage cannot be proved due to the non-availability of witnesses, but prolonged and continual living together as husband and wife can be shown, marriage will be presumed

If marriage cannot be proved through witnesses, it will be presumed in the following two cases:—

(1) Where prolonged and continual living together by the man and woman as husband and wife can be shown and the alleged spouses ac-

knowledge each other as being husband and wife who were lawfully married to each other. The *Fatāwā 'Ālamgiri* discusses the issue of mutual acknowledgment by husband and wife of the existence of marriage in cases of ambiguity, and considers affirmation on the part of both husband and wife to be an evidence of the existence of marriage.[14] In a number of cases, the Indian Supreme Court has relied on §114 of the Indian Evidence Act to presume the existence of marriage,[15] because the law "leans towards the legitimacy of marriage." Mere living together in an arrangement known as "common law marriage" in the West will not amount to a presumption of marriage. Marriage according to Islamic law has to be acknowledged from which all the legal effects like inheritance and waiting period (in case of divorce) will ensue. It has been decided by courts in British India that where a woman is a known prostitute the presumption of marriage cannot be drawn.[16]

(2) Marriage will also be presumed where the man acknowledges a child born to a woman as his *legitimate* child, this was mostly done in the case of children born of slave-girls.

1.3.8 The woman must not be one who is perpetually prohibited for the man

Marriage with a woman who is perpetually prohibited for the man is not valid. Women prohibited perpetually are of three types: those prohibited due to *qarābah* (consanguinity); those prohibited on account of *muṣāharah* (affinity, relationship by marriage); and *raḍā* (fosterage, suckling).

1. THOSE PROHIBITED ON ACCOUNT OF CONSANGUINITY:—Women prohibited on account of consanguinity fall into seven groups: (1) mothers how high soever; (2) daughters how low soever; (3) sisters, whether full, consanguine or uterine; (4) paternal aunts how high soever; (5) maternal aunts how high soever; (6) brother's daughters how low soever; (7) sister's daughters how low soever.

2. THOSE PROHIBITED ON ACCOUNT OF AFFINITY:—Women prohibited on account of a marriage relationship or affinity fall into four

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[14] Compare *Hidayatoollah v. Rai Jan Khannon*, S Moore's I, A., 295; *Mahatala Bibee v. Ahmed Haleemoozaman*, 10 Cal, L.R., 293, as quoted by Amir Ali.

[15] See, e.g., *Mohammed Amin v. Vakil Ahmed*, AIR 1952 SC 358; *Abdool Razack v. Aga Mahomed Jaffer*, (1893) 21 Ind App. 56 (P.C.); and *Ghasanfar Ali Khan v. Kaniz Fatima*, 87 (1910) Ind. App. 105.

[16] See cases menetioned in the previous footnote.

groups: (1) wife's mother and wife's grandmothers, whether maternal or paternal, how high soever; (2) wife's daughters and their daughters, and her son's daughters and their daughters how low soever, when the marriage with his wife has been consummated; (3) the wife of his son, wife of his son's son, and the wife of his daughter's son how low soever; (4) father's wife or paternal grandfather's wife how high soever.

3. THOSE PROHIBITED ON ACCOUNT OF WET-NURSING:—All seven categories of women who are prohibited due to consanguinity are also prohibited on account of wet-nursing (suckling).[17]

To the above cases may be added a woman with whom a father or a son has had unlawful sexual intercourse, that is, committed *zinā*, but there is a debate about it. Some jurists go to the extent of prohibiting even those with whom a father or a son has had a physical relationship even if it falls short of *zinā*.

1.3.9 The marriage concluded should not result in combining two *dhawātu 'l-arḥām* or in admitting a fifth wife

A man's marriage to a woman should not result in combining two wives who are *dhawāt ul-arḥām* or in adding a fifth wife to the four to whom he is already married. It is prohibited to marry two sisters at one time or a woman and her daughter. All other cases are governed by the general rule that it is not permitted to combine two females in marriage in such a way that if one of them had been a man he could not be lawfully married to the other, like combining a woman and her paternal aunt or maternal aunt.

If a man marries one such woman after the other, the marriage contract with the first is valid, while the marriage contract of the second is irregular (*fāsid*) due to *shubhah*. His second wife is to be separated from him. If the marriage was not consummated, she is not to be paid dower nor is she to undergo the *'iddah* (waiting period). If the marriage was consummated, she is entitled to dower and will undergo the *'iddah* during which the man is not permitted to cohabit with the first wife.

If a man has four wives and he divorces one of them, he cannot marry her sister as long as the first sister is undergoing her *'iddah*.

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[17] The detailed meaning and rules of suckling are to be found in the book of *raḍā'*. There are two exceptions to the rule stated, which are also to be found in the book of *raḍā'*.

FIFTH WIFE:—A freeman has the right to marry four freewomen and slave girls, but he is not to marry more than this number. If a man divorces his fourth wife, he cannot take another fourth wife as long as the divorced wife is undergoing her *'iddah* (waiting period), even where he divorced her through a triple repudiation.

1.3.10 The woman to be wed should not be married to another

A woman who is already married to another cannot be a party to another marriage contract irrespective of her husband being a Muslim or a non-Muslim.

Provided that marriage may be contracted with married women who become prisoners of war and move to the *dār al-Islām* from the *dār al-ḥarb*, while their husbands are still in the *dār al-ḥarb*. This is the result of the rules of slavery and perpetual separation due to the two *dārs*. As slavery is no longer prevalent, the proviso becomes redundant.

1.3.11 The woman to be wed should not be in her waiting period (*'iddah*)

A woman who is in her waiting period from another person cannot be sent a message or informal proposal to obtain her consent to marriage. As such an informal proposal is not permitted, therefore, the formal contract of marriage is also not permitted. It is of no consequence that the waiting period is the result of divorce, death, an irregular contract or the semblance of a contract.

Provided that the owner of the waiting period (husband) has the right to give the woman away in marriage if there is no other obstacle besides the *'iddah*.

1.3.12 The woman to be wed should not "be with child" of established paternity

The woman to be married should not be with child of established paternity. A woman who is pregnant as a result of unlawful sexual intercourse or rape is not subject to this condition, according to Abū Ḥanīfah and Muḥammad, but she is subject to it according to Abū Yūsuf.

The condition does not apply to a woman who has moved over from the *dār al-ḥarb* to the *dār al-Islām* or has become a prisoner of war.

1.3.13 That the parties should be affiliated with some *millah* (religion)

An apostate cannot marry either a Muslim or an unbeliever, except an apostate like him.

An apostate (*murtad*) is one who has relinquished the Islamic faith and is to be compelled to return to it under threat of execution if he is a man, and by imprisonment and beating if a woman, which is to continue till she dies. The apostate is treated as legally dead until he or she repents and reverts to Islam.

1.3.14 The bride (woman) should not be a polytheist when the groom (man) is a Muslim

It is not permitted to a Muslim man to marry a polytheist woman (*mushrikah*). It is permitted to him to marry a Kitābiyyah, that is, one from the People of the Book. The word *muḥṣanāt* in this context implies that such women should be chaste.

The People of the Book include Jews, Christians and Magians. The Sabians are included in this category according to Abū Ḥanīfah, but Abū Yūsuf disagrees.

1.3.15 The groom (man) must be a Muslim when the bride (woman) is a Muslim

A Muslim woman is not to marry an unbeliever. A Muslim woman is not to marry a Kitābī either. If such a contract is concluded it is deemed to be irregular (*fāsid*) due to *shubhah*, that is, *ḥadd* is not imposed. Nevertheless, according to some jurists, the man is to be awarded *ta'zīr* for he violated the symbols of Islam as well as Muslim public law.

1.3.16 The contract of marriage must be intended as a perpetual contract; contract for a temporary marriage is not permitted

Temporary marriage is of two types according to Ḥanafī law:—

(*a*) The first type of temporary marriage is one that is concluded with the word *tamattu'* (utilization) in which the man says to the woman, "I will pay you so much so I can utilize you for a day, week, month or so on." This form of contract is *bāṭil* (void).

(*b*) The second form of temporary marriage is concluded using the word *nikāḥ* in which the man says to the woman, "I will marry you for ten days (for example)…." This type of contract is irregular (*fāsid*), that is, it can be rectified and made valid if the condition of limit on time is removed. According to Zufar, the contract is valid and the condition placing a time limit is not acknowledged legally.

1.3.17 Shī'ah law permits *mut'ah*

According to Amir Ali, *mut'ah* or temporary marriage may be contracted by a Shi'ah man with a woman who is a Muslim or a Kitābiyyah. A Shi'ah woman may not contract a temporary marriage with a non-Muslim.

A *mut'ah* marriage is valid if the period is fixed and dower is specified. The contract is void if dower is not fixed. If the time is not fixed the marriage may be presumed to be permanent. The woman receives full dower if the marriage is consummated and one-half dower if it is not. Dower is recoverable, if she leaves earlier, for part of the period left unfulfilled.

The contract ends with the termination of the period,. which may be terminated earlier by mutual agreement, or the man may release the woman earlier at his discretion. The parties to the contract of temporary marriage do not inherit from each other, but the children born of the marriage inherit from their parents. Maintenance may be provided to the woman during marriage although Shi'ah law does not recognize this.

MUT'AH **OR TEMPORARY MARRIAGE: AMIR ALI:** Amir Ali describes the *mut'ah* marriage as follows:

> Among the Akhbārī Shiahs, a temporary contract of marriage or a contract for a limited term is recognised as valid. Such marriages were frequent among the pagan Arabs and the Sabaeans, and were, for a time allowed by the Arabian Prophet. They were, however, forbidden in the tenth year of the Hegira. But somehow they have remained engrafted on the Akhbārī traditions. According to them, a man and a woman (possessing the capacity to marry) may enter into a contract of marriage for any period they like. Such marriage becomes dissolved either by efflux of the period fixed, or may be put an end to by mutual agreement. There is no divorce in such a marriage, but some of their lawyers think that the husband may "give away" the term without the consent of the wife. This view, though recognised in one case by the Calcutta High Court, is opposed to the nature of the contract which is founded essentially on mutual agreement. Besides it proceeds upon a fallacious reasoning that as the wife is merely a debtor, the creditor (the husband) may discharge the debtor without her consent, a view which is contrary to the opinion of the great Shiah jurists.

The children of such unions are legitimate and inherit from their parents, though the married parties do not, unless there is a contract to that effect.[18]

1.4 Conditions Imposed by the State (MFLO, 1961)

The total impact of the Muslim Family Laws Ordinance (VIII of 1961) is to be assessed by looking at the different provisions discussed in the relevant sections. Here only those provisions are discussed that affect the formation of the contract of marriage.

1.4.1 Conditions for marriage imposed by the State do not affect the legal validity of the contract, but entail criminal and/or financial liability

The law of the State of Pakistan lays down two conditions that must be complied with otherwise penalties are imposed. The two conditions pertain to "registration of marriages" and "polygamy" or the taking of an additional wife as permitted by the *sharīʿah*.

1.4.2 Registration of marriages

Section 5 of the Muslim Family Laws Ordinance (VIII of 1961) makes the registration of marriages compulsory in accordance with the provisions of the Ordinance. Section 5(4) of the Ordinance provides that default by the person who performs the *nikāḥ* is punishable with simple imprisonment for a term that may extend to three months and/or a fine of one thousand rupees. There is a debate among Muslim scholars whether the requirement of registration of marriages is in violation of Islamic laws. It is suggested that insofar as this is merely an administrative requirement (as stated by Mufti Shafi) there is no question of violation of Islamic laws. The state can do so by exercising its *siyāsah* jurisdiction.

1.4.3 Polygamy

Section 6 of the Muslim Family Laws Ordinance (VIII of 1961) makes the marriage of a man, who already has a wife or wives, contingent upon the permission of the Aritration Council constituted under the Ordinance. The Council among other things will verify whether permission of the existing wife or wives has been obtained and that the requirements of justice will be met. Section 6(5) provides that a man who contracts another marriage without obtaining the required permission is liable to punishment that may extend to one year simple imprisonment and/or become liable to fine that may extend to five thousand rupees. He will also be liable to pay immediately any amount of dower (of whatever nature) that stands unpaid.

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[18] Syed Amir Ali, *Student's Hand-book of Mahommedan Law*, 4th ed. (Calcutta: Thacker Spink & Co., 1903), 76.

This provision is questionable insofar as it raises the larger issue whether a right given by the *sharī'aḥ* can be taken away or annulled by the state. It is obvious that the state does not have jurisdiction over rights granted by the *sharī'ah*.

1.4.4 In State law, the need for an intervening marriage prior to re-marriage or of *ḥalālah* stands eliminated

Section 7 of the Muslim Family Laws Ordinance, 1961 identifies the approved form of divorce (*talāq*) and section 7(6) says that "Nothing shall debar a wife whose marriage has been terminated by *talāq* effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective."

This provision restricts divorce to the *aḥsan* (preferred) form. The *ḥasan* (acceptable) and the *bid'ah* (deviant) forms are not recognized by state law and will, thus, not be enforced. For the details of these forms and additional details, see §6.2. Some further details will come up in the part related to divorce.

CHAPTER 2

DOWER (MAHR)

2.1 Nature of Dower

2.1.1 *Mahr* (dower) is obligatory in marriage

Mahr is an obligatory amount to be paid by the husband to the wife as an essential requirement of a valid marriage contract. The validity of the marriage contract, however, does not depend upon the mentioning of the dower. If it is not mentioned at the time of the contract, the contract is still valid and *mahr* will be presumed in the form of reasonable dower (*mahr al-mithl*—مهر المثل). Any gifts given to the wife, over and above the dower, are irrevocable (see section on gifts).

Mahr (dower) is an obligation and it creates a debt that has to be paid to the woman. *Mahr* is obligatory (*wājib*) according to the *sharī'ah*, as a right of the *sharī'ah*, being an expression of the sanctity of the subject-matter.

2.1.2 Dower is not consideration in the contract of marriage

Mahr is not the same as consideration in contracts nor is it compensation for physical access to the wife; it is treated as a mandatory present that shows respect for the woman as it amounts to giving up something precious for her. The jurists do treat it sometimes as compensation for physical access for purposes of legal analysis, and even compare it to *bay'* (sale), but the distinction must be kept in mind.

2.1.3 Minimum amount of dower and determination of reasonable dower

Dower is determined according to the consent of the woman as it is her right, but the *sharī'ah* has determined that the minimum amount of dower is ten *dirhams* (which is 29.75 grams of pure silver) or their value. It is crucial to note here that the rules for all forms of equivalence, weights and measures will be those settled during the period of the Prophet (pbuh) as is done in the case of *ribā*. Ten *dirhams* in those days were equal to one *dīnār* or 4.25 grams of gold. Ten grams of silver, on the date of this writing, were worth Rs. 2751, while 4.25 grams of gold were worth Rs. 20,400. It is suggested that while determining minimum dower the courts should keep the amount at "whichever is higher of the two," so that minimal justice is provided to women.

If an amount less than ten *dirhams* is named, the woman is entitled to at least ten. If the husband stipulates that there is no *mahr* for the wife, the condition is void and the woman is entitled to reasonable dower.[19]

If no amount is mentioned, the woman is entitled to reasonable dower, which cannot be less than ten *dirhams*. The dower can, however, be fixed after the contract. After the contract, the man can increase the dower, and the woman can decrease the dower, named in the contract.

The reasonable dower of the woman is to be estimated in the light of the dower of her sisters, paternal aunts and the daughters of paternal uncles.[20] Her *mahr* is not to be estimated in the light of the *mahr* paid to her mother and maternal aunts, if they do not belong to her tribe (family). Determination of reasonable dower is also affected by the woman's property, age, beauty, intelligence and religion. It is to be increased for a woman with more property, younger age, greater beauty and intelligence.

2.1.4 The thing named as dower must be marketable wealth. *Vanī* and *badal-i-ṣulḥ* are not valid as dower

The thing named as dower must be marketable wealth. If the man marries the woman in return for teaching the Qur'ān, imparting knowledge of *ḥalāl* and *ḥarām*, or taking her for *ḥajj* or *'umrā*, then these are not valid forms of dower and she is entitled to *mahr al-mithl* (reasonable dower). The contract is valid, because its validity does not depend upon the naming of dower.

Stipulations like divorcing a prior wife, pardon from a claim of *qiṣāṣ*, that is, practices like *wannī* are not valid as dower. If stipulated, they will be treated as void, but the contract of marriage if concluded will be treated as valid as if no dower has been mentioned.

If a man gives away his daughter in marriage to another on the condition that the other wed his daughter or his sister to him so that one contract be a counter-value (compensation) for the other contract, then, the two contracts are valid, and each woman married is entitled to reasonable mahr (according to her status). This type of *nikāḥ* is called *shighār*.

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19. Zufar said that naming *mahr* that is less than ten *dirhams* is unlawful. It is as if he has named *khamr* or *khinzīr*, therefore, the woman is entitled to reasonable dower.

20 This is due to the saying of Ibn Mas'ūd (God be pleased with him) that "she is entitled to the dower paid to the women of her family without increase or decrease, and these are women related to the father."

If a man marries a woman on the condition that he will not take her away from her city or that he will not take another wife during her life, then these are not valid forms of dower, and the woman will be entitled to reasonable dower.

If a man marries a woman on the condition that he will serve her for one year, then such dower is not valid and she is entitled to reasonable dower, according to Abū Ḥanīfah and Abū Yūsuf, because they uphold the rule that *manfa'ah* (usufruct, benefit) is not wealth. Muhammad maintains that the services of a freeman are wealth and the woman is entitled to their value.[21]

2.1.5 The thing named as dower should not be an unknown thing

The thing should not be something whose uncertainty is in excess of reasonable dower. It may be an ascertained thing that is pointed out, or it may be an unascertained thing that is pointed out.[22] If it is an ascertained thing, whether it is something that is ascertained in contracts like goods, real estate and animals, other than things that are not ascertained in contracts like *dīnārs* and *dirhams*, the dower is valid. In such a case, the husband does not have the right to retain the thing and give something else in return, because the wife's right is attatched to the corpus of the thing named.

If it is something that is not ascertained in contracts (like currency), the husband has a right to retain it and deliver a similar in specie, type and quality. If it is gold or silver in the form of dust or ore, then ascertainment is necessary and the husband is to be compelled to deliver the same specie.

If the dower named is something that is not identified, like a dress, animal or a house, then it is not valid as dower due to excessive uncertainty. This uncetainty is similar to that in contracts of sale or hire, and is in excess of the uncertainty surrounding reasonable dower. In such a case the woman is entitled to reasonable dower.

If the man makes stipulations like saying, "I will pay you one thousand if I have no wife, and two thousand if I have a wife," or "One thousand if I do not take you out of your city and two thousand if I do", the contract is valid. The first part of the dower stated (one thousand) is valid in both cases, but if he has another wife or if he takes her out of the city she is entitled to reasonable dower in both cases. This is the view according to Abū Ḥanīfah. According to the two disciples, both parts of the stipulations are valid. If he marries two women with a single dower, the dower is valid and will be distributed among both women in proportion to their reasonable dower.

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[21] Perhaps Imām Muḥammad has the cases of Shu'ayb and Moses (pbuh) in mind.

[22] Where the husband has transferred some property in the Nikahnama/marriage certificate in lieu of dower, it has been held that the same is proof enough of transfer, without the transfer requiring any formal registration to this effect by the husband. On the basis of this entry, the wife can claim maintenance. In *Haji Ajab Gull v. Rahim Gul*, 1991 SCMR 2500, the Supreme Court of Pakistan held

2.1.6 Dower in order to be valid must be named in a contract that is valid and not irregular

Dower in order to be valid must be named in a contract that is valid. It is not valid in an irregular (*fāsid*) contract.

Dower is not binding in an irregular contract, however, if consummation takes place in a *fāsid* contract, it becomes due on account of intercourse and not the contract itself.

2.2 Prompt and Deferred Dower

2.2.1 Cause of obligation of dower, time of obligation and mode of obligation: prompt and deferred dower

Dower becomes due in a valid contract, unlike an irregular contract, on account of the contract itself. For this purpose, and for legal analysis, it is treated like a counter-value in a contract of sale, that is, consideration in return for physical access to the wife, irrespective of the dower being mentioned in the contract, although dower is not consideration as stated earlier.

Marriage differs from sale insofar as in sale the delivery of counter-values becomes due immediately upon the conclusion of the contract, but in marriage the time for delivery is extended as it is treated as an obligation with extra time (*wājib muwassa'*). If the woman demands the delivery of dower it turns into *wājib muqayyad* (obligation limited in time). The right of the wife over the dower is not ascertained through the contract, but through possession, therefore, it becomes obligatory on the husband to deliver it if it is demanded by the wife.

Dower is prompt, deferred or prompt in part and deferred in part. Dower is the right of the woman and she has to agree in the marriage contract whether dower will be prompt, deferred or prompt in part and deferred in part.

2.2.1.1 Prompt dower

Dower may be prompt (معجل) that is payable promptly or on demand to the woman if it is so agreed in the marriage contract.[23] If silence is maintained about the time of payment of dower, it will be presumed to be prompt (this rule is affirmed in section 10 of the Muslim Family Laws Ordinance, 1961). It is payable at once if the woman requires it, and, prior to consummation, and till such time that it is paid she has the following rights:—

(*a*) She has the right to deny the husband the right of cohabitation till the full dower is paid, even if she has moved to the husband's house.[24]

(*b*) The husband does not have the right to keep her confined to the house and she can go out at will; once the full dower is paid the husband will have this right and the right of cohabitation, but he still cannot prevent her from going for *ḥajj* (pilgrimage).

(*c*) The woman will have the above two rights even if a single *dirham* remains undelivered.

(*d*) Where the wife consents to delay in the payment (say for a month) of the prompt dower, she does not have the right to deny him cohabitation during this period (of one month).

2.2.1.2 Deferred dower

Dower may be deferred in its entirety (مؤجل or غير معجل). It is customary to assume that the time of payment will be death or divorce. If the husband fixes the time of delayed payment to be some unknown event like "when it rains," "at the time of financial ease," or the "change of season" the period of delay is not established and the dower becomes prompt. Where a known time is specified by the husband, the wife does not have the right to deny cohabitation to the husband according to Abū Ḥanīfah and Muḥammad, and this is the prevalent opinion. Abū Yūsuf maintained that she still retains the right to deny cohabitation to the husband, unless she consented to this right at the time of the determination of the delayed period.

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[23] In *Syed Muhammad v. Mst. Zeenat and others*, PLD 2001 SC 128, the Supreme Court observed that prompt dower was to be recovered during subsistence of marriage, that no period of limitation is provided for its recovery and that the husband is under an obligation to pay the same whenever demanded by the wife.

[24] In *Chanani Begum v. Muhammad Shafique etc.*, 1985 MLD 310, the Court held that the wife could refuse to live with her husband if her prompt dower had not been paid and could also demand maintenance from the husband till such time prompt dower was paid to her.

2.2.1.3 PART PROMPT AND PART DEFERRED

Dower may be prompt in part and deferred in part; the part that is deferred being payable upon death or divorce. Abū Yūsuf has preferred this view, and it is the customary practice in most Sunni jurisdictions. Other jurists have denied the legal validity of splitting dower with respect to time, and maintained that it will become prompt in its entirety.

2.2.2 Confirmation of full dower

Payment of full dower, whether specified or reasonable, is confirmed on account of three things: consummation, proper seclusion of husband and wife, and death of either party. No part of it lapses, except by relinquishment (*ibrā’*) by the person to whom it is due.

1. **Consummation:** Dower is a debt established through the contract of marriage and by consummation the contract stands fully executed, therefore, no part of the dower can be extinguished.

2. **Proper seclusion:** Dower becomes confirmed upon proper seclusion of husband and wife and it is presumed that consummation has taken place, and this is an irrebuttable presumption.[25] Proper seclusion is one in which there is no barrier or obstacle between husband and wife with respect to consummation. It is presumed that the wife has submitted herself to the husband and is, therefore, entitled to full dower whether or not he has intercourse with her.

   An obstacle to proper seclusion is either real, legal or physical. A real obstacle is found when one of the parties is ill to the extent that prevents intercourse, or one is a minor with whom sex is not possible, or the woman suffers from *ratq* or *qarn*.[26] If the husband is impotent (*‘innīn*) or castrated, it does not amount to an obstacle. Amputated genitals are also not an obstacle in Abū Ḥanīfa’s view, but Abū Yūsuf and Muḥammad maintain that it does amount to an obstacle.

   A legal obstacle is one where one of the parties is fasting, is in a state of *iḥrām* due to the *ḥajj* or *‘umrah*, the woman is menstruating or is in her postnatal period. Menstruation and postnatal bleeding are also considered physical obstacles.

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[25] That is, evidence cannot be led to show that there was no sex, unless it can be shown that sex was not possible due to some barrier or obstacle.

[26] Natural defects of the vagina that prevent sex.

A physical obstacle is one where a third person is present. The assumption here is that it is unnatural for husband and wife to have intercourse in the presence of a third person. For this purpose it does not matter if the third person is blind, sleeping, sane, minor, or stranger (man or woman). If the minor is insane, the obstacle is not found as he is associated with animals for this purpose. In *fiqh*, the presence of the husband's slave girl has not been considered an obstacle.

3. **Death of one of the spouses prior to consummation of marriage confirms the dower**. As the contract was for life, dower becoming obligatory due to the contract, death does not revoke the contract, it merely brings the term to completion. Dower, like all debts, is not extinguished by death. Dower is payable if the woman has committed suicide, or where either party is murdered by someone, or one spouse has killed the other,[27] or either one has died a natural death.

2.2.3 Causes leading to the extinction of full dower

Dower is extinguished in its entirety due to four causes:—

(*a*) *Separation (furqah) without divorce prior to consummation and prior to proper seclusion:* Each separation prior to consummation and prior to proper seclusion extinguishes the entire *mahr* (dower), whether the separation occurs due to an act of the husband or wife. Separation (*furqah*) that is not by way of divorce amounts to *faskh* (revocation, cancellation) of the contract, and *faskh* (فسخ) leads to the extinction of the entire dower, because it is the cancellation of the contract *ab initio*, as if it had never taken place.

(*b*) *Discharge (ibrā'):* Discharge or extinction of the entire debt on the part of the wife, prior to consummation or after it, because dower is a debt. Discharge of a debt by one who has the power of discharging the debt leads to its extinction.

(*c*) *Khul' (pronounced khula' sometimes, especially in Pakistan): Khul'* or release in lieu of the dower prior to consummation or after it. If the dower has not been taken into possession, the claim is discharged in favour of the husband. If it has been taken into possession by the wife, she returns it to the husband.[28]

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[27] The rule of prohibition of inheritance is different from this rule.

(*d*) *Gift of the entire dower by wife in favour of the husband:* A gift of the dower made by the wife, whether *'ayn* (chattel) or *dayn* (debt), and whether or not it has been taken into possession by the wife, in favour of the husband extinguishes the entire dower when the requirements of gift (*hibah*) have been observed.

2.2.4 Causes leading to the extinction of one-half dower

Dower to the extent of one-half is extinguished due to two causes:—

(*a*) *Extinction of one-half dower in both form and meaning:* The first cause is divorce prior to consummation after a marriage contract *in which the dower was named,* but it remained a debt that was not taken into possession by the wife. One-half dower is extinguished whether the remaining one-half is treated as dower or as *mut'ah* (gift of consolation).

(*b*) *Extinction of one-half dower in form and full dower in meaning:* The second cause is divorce in which gift of consolation becomes obligatory. This divorce is of two types:

- (*i*) The first is divorce prior to consummation after a marriage contract *in which dower is not named before marriage, stipulated after it, or in which the dower is fāsid (irregular).*
- (*ii*) The second is divorce prior to consummation after a marriage contract *in which dower is not named before marriage, but is stipulated after it.*

2.3 Disputes Over Dower

2.3.1 Disputes among spouses over dower

Disputes among spouses over dower occur in three forms: (a) disputes over dower during the lifetime of the spouses; (b) disputes between a living spouse and heirs of the deceased spouse; and (c) disputes over dower between the heirs of spouses when both are dead.

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[28] Details of *khul'* will be coming up in the Book of Divorce

(1) A dispute between the spouses themselves can occur prior to divorce or after it. If the dispute is *before divorce* about the naming of the dower, reasonable dower becomes obligatory, because the original obligation is reasonable dower and the issue reverts to the original. If the dispute is about the amount of the dower named, its specie, kind and quality, then the position is analyzed into two forms: the dower may be a *dayn* or an *'ayn*, where *dayn* means currencies that are associated with the *dhimmah* as a liability in contracts. This is further analyzed into the situation where the dispute is before divorce or after divorce.

(*a*) *Where the dispute arises before divorce:* Where the dispute arises before divorce and it may pertain to absolute currencies (like *dinārs* and *dirhams*), to fungible items (like wheat, barley and so on), or it may pertain to goods (like animals and dresses).

  (*i*) If evidence is available, the dispute will be resolved on the strength of such evidence.

  (*ii*) If evidence is not available or if it is available but the probabilities are equally strong, oaths will be administered and the oath of the woman is usually given precedence to the extent of reasonable dower, while the statement of husband is preferred where the acknowledgement is about an amount in excess of reasonable dower. Refusal to take oath will be construed as acknowledgement of the claim of the other party.

  (*iii*) Where the issue cannot be resolved on the basis of evidence or oaths, the dispute will be resolved by resorting to the original rule of reasonable dower.

(*b*) *Where the dispute arises after divorce:* Where the dispute arises after divorce, it will be examined whether marriage was consummated or not consummated. The resolution of the dispute in such a case will be in the same manner as in 1(a), but the dower will be one-half, with the statement of the husband being given precedence with respect to the amount of dower.

(2) Where the dispute arises between the heirs of a deceased spouse and the living spouse, the response is the same, that is, the acceptable statement is that of the woman or her heirs if she is dead, up to the extent of reasonable dower, while the acceptable statement is that of the husband and his heirs if he is dead when they acknowledge an amount in excess of the reasonable dower.

(3) Where the dispute is between the heirs of the deceased spouses, and if they disagree about the naming of the dower, then Abū Ḥanīfah maintains that no relief is to be given unless the heirs come up with evidence about naming of the dower, but the two disciples maintain that reasonable dower is to be awarded. The provisions about the registration of marriages alters the situation stated above, but in case no evidence is available the above rules are to be followed.

2.3.2 Remedies available to the wife for non-payment of dower under rules settled during the days of British India

Under the prevailing state law, the wife has the following remedies:

2.3.2.1 DOWER IS AN UNSECURED DEBT, AND THE PERIOD OF LIMITATION FOR RECOVERY IS THREE YEARS

According to a number of cases decided in British India, different kind of remedies were recognized, some were based on self-help while others were through court.

(2.3.2.1.1) Dower is an unsecured debt.—The widow's claim for dower is treated as an unsecured debt, which is chargeable against the husband's estate. It is ranked like the debt of other creditors and is to be paid before legacies and before distribution of the inheritance. It is a debt in the case of a continuing marriage as well, as has been explained above.

(2.3.2.1.2) Period of limitation.—The period of limitation for a suit to recover "prompt" dower is three years from the date when the dower is demanded and refused, or, where during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death or divorce.

(2.3.2.1.3) A simple money decree may be made by the court and a charge is not to be created.—As a charge gives priority to the dower debt over the right of other creditors, it is proper for the court to pass a simple money decree for the recovery of the debt. A charge may, however, be created by agreement.

2.3.2.2 THE WIFE MAY REFUSE TO LIVE WITH THE HUSBAND IN A SUIT FOR THE RESTITUTION OF CONJUGAL RIGHTS IF PROMPT DOWER STANDS UNPAID

The wife may refuse physical access to herself by the husband or may refuse to live with the husband where he sues her for the restitution of conjugal rights. The suit for restitution of conjugal rights is to be dismissed if the husband and wife have not had sexual intercourse at all, but if they have had such intercourse a decree for restitution may be passed upon the condition of payment of prompt dower.

2.3.2.3 THE WIDOW MAY RETAIN PROPERTY THAT IS IN HER POSSESSION, BUT THIS DOES NOT GIVE HER THE RIGHT TO ALIENATE THE PROPERTY OR SELL IT OFF

The widow has the right to retain possession of property, as long as such possession has not been obtained by force or fraud. This right of retention does not give the widow a title to the property, nor is similar to a right acquired under a mortgage. Accordingly, the widow cannot sell[29] or mortgage such property satisfy the dower debt.[30] She also does not have a right of retention against a former purchaser or mortagee from her husband.[31] There are two view on whether the right of retention is heritable, upon the death of the widow, or transferrable, but the view that it is not transferable prevails.[32]

The mere fact that the widow is in possession of her husband's property under a claim for her dower, does not preclude her from maintaining a suit to recover the amount of the dower.[33]

The widow is under a duty to account to the other heirs of her husband for the rents and profits received by her, but she is entitled to compensation for forbearing to enforce her right, which the courts have interpreted as interest on the dower debt.

2.3.2.4 SUIT FOR RECOVERY OF DEFERRED DOWER, HEIRS AND LIMITATION

The wife may sue for the recovery of deferred dower. The heirs are not personally liable for dower debt. It is the estate that is liable, therefore, each heir is liable to the extent of his share in the estate. Once the heirs have paid proportionately, they are entitled to the release of the property that may be in the possession of the wife.

The period for suit to recover deferred dower is three years, under the Limitation Act, from the date the marriage is dissolved by death or divorce.

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[29] *Ali Muhammad v. Azizullah* (1883) 6 All. 50.

[30] *Chuki Bibi v. Shams-un-Nisa* (1894) 17 All. 19.

[31] *Ameer Ammal v. Sankaranarayanan* (1900) 25 Mad. 658.

[32] *Hadi Ali v. Akbar Ali* (1898) 20 All. 262.

[33] *Ghulam Ali v. Sagir-ul-Nisa* (1901) 23 All. 432.

2.3.3 Disputes about household assets when the spouses have no supporting evidence

Disputes among spouses over household assets occur in three forms: (a) disputes over the assets during the lifetime of the spouses; (b) disputes between a living spouse and heirs of the deceased spouse; and (c) disputes over dower between the heirs of spouses when both spouses are dead.

In all the above situations, Abū Yūsuf maintains that the items that are suitable for a male belong to the husband, while those that are suitable for a female belong to the wife. In those things where it is difficult to decide on the basis of gender, the assets are to be allocated according to the statement of the husband. Abū Ḥanīfah disagrees in certain situations and prefers the claim of the husband in most cases.

CHAPTER 3

CONDITIONS THAT MAKE THE CONTRACT NON-BINDING

Non-binding here means that the contract can be terminated by both parties. The husband can terminate it through divorce anyway, but the wife, or the *walī* may also be granted such a right.

3.1 Conditions That Make the Contract of Marriage Non-Binding are of Two Types

Conditions of *luzūm* or conditions that make the contract *ghayr lāzim* (non-binding) are of two types: (a) Those that relate to the very occurrence of the contract and (b) Those that relate to the continued existence of the contract.

Conditions pertaining to the occurrence of the contract are about:—

(*a*) The option of puberty.

(*b*) Proportionality of status (*kafā'ah*) when marriage is indpendently contracted by a girl who is a major and sane.

(*c*) Major defects in the male.

(*d*) Minor defects in the male.

Conditions pertaining to the continued existence of the contract are about:—

(*a*) *Tamlīk* and *tafwīḍ*.

(*b*) Continuing ability of the husband to maintain wife.

The first type are discussed below followed by the second type in the next section.

3.2 First Type: Those That Make the Contract Non-binding

3.2.1 Option of puberty: if the *walī* in the marriage of a minor is other than the father or grandfather, the minor acquires the option of puberty

If the person contracting the marriage of a minor, boy or girl, is the father or the grandfather, the contract is binding upon the said minor and there is no option upon attaining puberty. Where the person contracting the marriage of such a minor is other than the father or the grandfather (like uncle or brother), the minor, whether boy or girl, has an option, upon attaining puberty, to revoke the contract, according to Abū Ḥanīfah and Muḥammad. According to Abū Yūsuf, the contract is binding and the minor has no option to revoke it upon attaining puberty.

3.2.2 If a major girl independently concludes her own marriage, the groom must have a status similar to hers (*kafā'ah*)

Where the question of proportionality and dower arises in the case of a girl who is a major and sane, the type of *wilāyah* that is shared or is recommended comes into operation. According to most jurists (in the school) if the major female marries someone who is below her status the *walī* or guardians have the right to object. Abū Ḥanīfah applies this opinion to meagre dower as well. Muḥammad maintains that such marriages are not to be consummated until the *walī* or the judge ratifies them.

Where a disagreement arises between the ward and the *walī* in a marriage contracted independently by the girl, the matter is to be resolved by the judge. The contract does not become binding until the matter is resolved by the judge, that is, it can be terminated at the option of the parties.

3.2.3 If a major girl independently concludes her own marriage with a man of her own status, the dower must be reasonable

Where a major and sane girl independently contracts her own marriage with a man of proportional status, the dower named must be reasonable and the *walī* has the right to raise an objection. The groom should increase the dower so that it amounts to reasonable dower otherwise the contract remains non-binding and the two are to be separated. This is the opinion of Abū Ḥanīfah. According to Abū Yūsuf and Muḥammad, this is not a condition and the contract is binding even if the dower is not reasonable. The *walī* has no right to object in their view.

3.2.4 The groom must not have major physical defects that make him ineligible for marriage

Where the groom has genital or other defects that do not enable him to have sexual intercourse, the contract becomes non-binding and grants the woman the right to seek spearation, unless she was informed of these defects and her consent to marriage was obtained.

The jurists list several defects under this category: the absence of the penis (due to mutilation or otherwise); prolonged impotence; castration and being a eunuch. According to some jurists, in the case of impotency of the groom a period of one year is to be given for possible recovery before the contract is revoked and the spouses separated by the judge. Further time can be given only with the consent of the wife.

3.2.5 Minor physical defects may not make the groom ineligible for marriage

Where the husband suffers from defects other than those mentioned in the previous section, the contract does not become non-binding. Freedom from such defects is not a condition for the validity of marriage and the contract cannot be subjected to *faskh*. An example may be temporary impotency.

3.3 *Second Type: Those That Affect the Continued Existence of the Contract*

3.3.1 The delegation of the power of divorce by the husband to his wife or to another person will affect the long-term binding nature of the contract

The delegation of the right of divorce to the wife by the husband through *tamlīk* or *tafwīḍ* renders the continued existence of the contract uncertain, and it becomes non-perpetual. This is done at the time of the contract and even later, like the husband saying to his wife "You may divorce yourself," "Your affair is in your hands" or "You are divorced if you like." The husband can also say to a third person, "Divorce my wife if you like."

The continuity of the contract also becomes uncertain when *tamlīk* or *tafwīḍ* is made contingent or is associated with time.

3.3.2 Maintenance of wives: the continued ability of the husband to maintain his wife is not a condition for the long-term binding nature of the contract

The continued ability of the husband to maintain his wife does not make the contract of marriage uncertain and non-perpetual. According to Imām al-Shāfiʻī, it is a condition for the continuity of the contract of marriage and the wife has the right to seek separation.

§2(ii) of the Dissolution of Muslim Marriages Act, 1939 says that where the husband neglects or fails to maintain his wife for a period of two years it becomes a ground for the dissolution of the marriage. The right has been acknowledged by the courts,[34] and is treated as an independent right.[35] The courts have interpreted "two years" to mean a single continuous and unbroken period of two years and not an aggregate of several period amounting to two years,[36] and these two years should immediately precede the suit for dissolution.[37] "Neglect" has been interpreted to mean wilful neglect to maintain wife.[38] Burden of proof lies on the husband, that is, he has to prove that he maintained his wife.[39]

The position taken in the Ḥanafī law is that marriage is a contract that is different from a commercial contract. A major purpose is that the husband should maintain his wife according to prescribed rules, but it also implies that as the contract is not a commercial contract the wife has to bear the vicissitudes of life and endure the hardships of family life according to the status of the husband. Some courts have, however, treated reasons of poverty, failing health, loss of work, or any other cause as immaterial.[40] We would say that this amounts to treating as a commericial contract, and treating the marriage contract as a commercial venture reduces it to the level of prostitution.

Accordingly, where the husband for some reason is unable to maintain his wife, but the wife is living with him, the cause of action should not arise. If, however, the husband intentionally deprives the wife of her maintenance or does not keep her at his house, that is, fails to provide her residence, the cause of action for dissolution of marriage definitely arises.[41] It is, therefore, suggested that separation from the husband, caused by the husband, should be made a condition in such cases. If this is the case, the period of two years laid down in the law appears to be lengthy and may be reduced.

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[34] *Muslim Sher v. Qudrat Bibi and another*, PLD 1984 Pesh. 91; NLR 1980 AC 43; NLR 1983 SCJ 1.

[35] *Muslim Sher v. Qudrat Bibi and another*, PLD 1984 Pesh. 91; *Wahid Bakhsh v. Sughran Mai*, 1988 CLC 1638.

[36] NLR 1989 SD 487

[37] Ibid.

[38] NLR 1989 SD 199

[39] NLR 1989 SD 487.

[40] NLR 1989 SD 487; *see also* PLD 2001 Lah. 188, 2001 YLR 2329, 2000 SCMR 88.

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[41] Where wife lives separately of her own accord, she is not entitled to maintenance. 2002 CLC 1450.

CHAPTER 4

MARRIAGES OF DHIMMĪS AND *ḤARBĪS*

4.1 *A marriage that is valid for Muslims by meeting all the conditons of validity is valid for the non-Muslim citizens as well*

(1) The general rule in the Ḥanafī school of law is that non-Muslim citizens are to be left alone to manage their affairs according to their beliefs.

For the maintenance of the symbols (*sha'ā'ir*) of the *sharī'ah*, the preferred practice is to treat all the conditions of validity that are applicable to Muslims as conditions of validity for non-Muslims. Certain contracts that are irregular for the Muslims may be treated as valid for non-Muslims. Thus, the *ḥadd* of *zinā* will not be awarded to the non-Muslim citizens in contracts listed in §5.1.3, which are based upon *shubhah*.

If non-Muslims, for example, in brazen violation of the norms of Islam, maintain that living together by a man and woman, as is done in the West under the name of "common law marriage," may be permitted to them, assuming that the Pope has permitted such marriages along with gay marriages, then this will raise serious issues and it cannot be allowed in an Islamic Republic. In actual fact, this is not allowed by the Christian and Jewish faiths, and the example is just to highlight a point.

4.2 *Each contract that is irregular when concluded among Dhimmīs is irregular for the Ḥarbīs (enemies resident in Muslim territory) as well*

The rules applicable to non-Muslim citizens are also applicable to non-Muslims from enemy lands resident in the territory of Islam.

CHAPTER 5

LEGAL EFFECTS (ḤUKM) OF MARRIAGE AND THEIR REMOVAL

5.1 *Legal Effects of Marriage Contracts in General*

5.1.1 The legal effect of marriage depends upon whether the contract is valid, void or irregular

The legal effect (*ḥukm*) of marriage depends upon whether the contract of marriage is valid, void or irregular.

5.1.2 A contract of marriage that is void has no legal effects, but will invoke the *ḥadd* of *zinā* if consummation takes place

A contract that is void will have no legal effect, except that the penalty (*ḥadd*) of *zinā* will be invoked for the parties to the contract if cohabitation takes place as it amounts to a confession of the offence of *zinā*. Any children born of such a union will be deemed illegitimate.

5.1.3 Certain void contracts are treated like the irregular contracts due to *shubhah*

A void contract is one in which the contract does not come into existence at all. As their is no contract, the contract should have no legal effects at all.

Certain void contracts are considered *fāsid* (irregular) due to *shubhah* or the semblance of the contract. In such cases, paternity is established and waiting period is prescribed on account of such *shubhah* and not the contract itself. Further, the *ḥadd* of *zinā* is also waived due to the same *shubhah*.

The contracts that can fall under this exemption are those where the contract of marriage with the woman was possible if the external circumstances did not exist and the woman was not perpetually prohibited. In some of these cases rectification is also possible. The following contracts fall under such *fāsid* (irregular) contracts:—

(*a*) contract without witnesses;

(*b*) marriage with a woman during her *'iddah*;

(*c*) marriage with a woman prohibited due to continuing marriage with an existing wife;

(*d*) marriage with a fifth wife;

(*e*) marriage by a Muslim man with a woman who is not a Kitābiyyah; and

(*f*) marriage of a Muslim woman with a non-Muslim man. In this case, a separation will be effected and the non-Muslim male will be subjected to *ta'zīr*.

In cases similar to those is clauses (b), (c) and (d) above, the requirement of the State of obtaining a divorce certificate will make the contracts prohibited till a divorce certificate is obtained.

Cases of gay marriages, or marriage with a eunuch, followed by sexual activity cannot be classified under such contracts as there is no *ḥadd* in such cases according to the Ḥanafī school, instead *ta'zīr* is awarded, which cannot be waived due to *shubhah*. Likewise, *ta'zīr* can be awarded in cases where *ḥadd* has been waived due to *shubhah*.

5.2 Legal Effects of a Valid Marriage Contract

5.2.1 A valid marriage contract has certain primary and secondary legal effects, where the foremost primary legal effect is the permissibility of intercourse

A valid marriage contract has the following primary legal effects:

(*a*) The permissibility of intercourse, except in the state of menstruation, post-natal bleeding, and *zihār* prior to expiation.

(*b*) The husband has a right to demand sexual intercourse (cohabitation) from his wife whenever he likes, except in the prohibited states mentioned above, however, he cannot force her into submission.

(*c*) The wife has a right to demand sexual intercourse (cohabitation) from her husband whenever she likes, except in the prohibited states mentioned in subsection, however, she cannot coerce him to do so.

5.2.2 A suit for restitution of conjugal rights may be filed when conjugal relations are disrupted

The current law permits the husband to sue his wife for the restitution of conjugal rights where the wife without lawful cause ceases to cohabit with her husband, but does not acknowledge a similar right for the wife. The *sharī'ah* grants such a right to the wife as well and such right must be acknowledged by the law, although such a suit will rarely be filed by a wife.

5.2.3 In a suit for restitution of conjugal rights the wife may have a number of defences or causes for refusing to cohabit with her husband

The *sharī'ah* grants the wife a number of defences for refusing to cohabit with her husband or for refusing to have physical access to her. The defences include:

(*a*) Non-payment of dower;

(*b*) False accusation of unlawful sexual intercourse (subject to *li'ān*); and

(*c*) Any other cause that may arise out of the rights given to the wife.

The law may grant other defences to the wife like cruelty and second marriage by the husband without seeking permission of the wife refusing to cohabit.

5.2.4 The husband has exclusive physical rights over his wife as long as she is alive and is married to him, but the wife does not have such an exclusive right

The husband has exclusive physical and other rights over his wife, that is, she cannot marry another husband while she is married to one husband.

The husband has the right to look at his wife and touch her as he likes, as long as she is alive. This right ceases with her death according to the Ḥanafī school. This right does not extend cohabitation beyond what is lawfully provided by the *sharī'ah*.

5.2.5 The husband has the right to prevent the woman from leaving the house without his permission

The husband has the right to prevent the wife from leaving the house without his permission. He cannot do so if he has not paid her prompt dower and he cannot prevent her from going for *ḥajj*.

5.2.6 A valid contract gives rise to the right to claim paternity of children born during wedlock

Paternity of children is the legal effect of cohabitation in reality, but the external cause of marriage has been substituted for it, because cohabitation is something private. Paternity will be presumed, even when there is physical separation between husband and wife, unless it is denied through the procedure of *li'ān* by the husband and is not denied by the wife during such procedure.

5.2.7 A valid contract gives rise to the duty of maintaining the wife and her children

The husband is under a duty to maintain his wife and her children from him according to his ability. For the details of maintenance for the wife and other relatives, see chapter on maintenance below on page 121.

5.2.8 A valid contract gives rise to the prohibition of marrying certain females related to the wife

The husband is prohibited from marrying certain females related to his wife. For the details of women prohbited on account of affinity when they are related to the wife, see §1.3.8 on page 40.

5.2.9 A valid contract gives rise to the right of inheritance for each spouse upon death of the other spouse

The contract of marriage gives rise to the right of inheritance by each spouse from the other spouse upon his or her death as the case may be, if death occurs during the subsistence of the state of wedlock.

5.2.10 A husband who has more than one wife is under an obligation to do justice to all wives

If a man has more than one wife, he is under an obligation to treat them equally with respect to his time, expenses, clothing and residence.

Equality is to be maintained even if one wife was a virgin prior to marriage to such person or was a widow or divorcee. Equality is also to be maintained even if one wife is young and the other old. Maintaining such equality does not apply when the person is travelling and wishes to take one wife along, but it is recommended that he draw lots for this purpose.

5.2.11 The wife is to be obedient to the husband for all reasonable and lawful demands

A duty is imposed on the wife to be obedient to the husband for all reasonable and lawful demands. If the wife is rebellious then the husband has a right to discipline through kindness, persuasion and reprimand, that is, in that order. He is to use light physical punishment as a last resort, when he suspects that she is inclined to have extra-marital relations.

5.2.12 It is recommended that the husband treat his wife with fairness and with respect

It is recommended that the husband treat his wife with fairness, with respect and according to what is customarily good (*ma'rūf*). The sanctity of the contract is to be maintained and not violated.

5.2.13 It is disapproved for the husband to evade conception of the child without the permission of the wife

The husband is not to avoid conception of a child during cohabitation, unless the wife consents to such avoidance of conception. There is no harm in doing so if the wife agrees.

5.3 *Legal Effects of an Irregular Marriage Contract*

5.3.1 Contracts that are considered irregular (*fāsid*)

A contract that does not affect the essential element and conditions (*aṣl*), but an external factor (*waṣf*) is said to be defective and is treated as irregular (*fāsid*). In certain cases, a void contract will be treated as *fāsid* due to *shubhah* (doubt).

The following contracts are considered irregular (*fāsid*) on account of *shubhah* for purposes of waiving the *ḥadd* penalty and for establishing paternity:—

(*a*) Marrying two sisters at the same time.

(*b*) Marrying the sister of an earlier wife who is now divorced but is in her waiting period.

(*c*) Marrying a woman who is in her waiting period.

(*d*) Marrying a fifth wife while the fourth wife who is divorced is still in her waiting period.

(*e*) A Muslim woman marrying a non-Muslim man. There is disagreement about this as legal effects do no follow according to some.

(*f*) A contract without witnesses is not irregular (as stated by some) but void, however, it is treated like an irregular contract due to *shubhah*.

The usual irregular (*fāsid*) contract arises due to a defect in the *waṣf* (an external factor). The woman is not entitled to residence and maintenance if consummation has taken place and the separation is effected. Examples of such a contract are:—

(*a*) A person stipulates in the contract that he will divorce the woman so that she can marry her first husband. According to some jurists, the contract is valid, but the stipulation is void.

(*b*) A man and a woman marry each other without knowledge that they are actually brother and sister through *raḍā*ʻ (suckling) as they have fed at the same breast. Strict legal analysis may be inclined to treat this contract too as one of *shubhah*.

5.3.2 An irregular (*fāsid*) marriage contract has no legal effects prior to consummation, except waiving of the *ḥadd* penalty

An irregular (*fāsid*) contract is not a contract at all, therefore, it has no legal effects prior to consummation.

5.3.3 An irregular (*fāsid*) marriage contract has certain legal effects after consummation

An irregular (*fāsid*) contract, after consummation, has certain legal effects. Among these is: the confirmation of paternity of a child born out of such an event; the obligation of *ʻiddah* (waiting period), which is the legal effect of consummation in reality; and the obligation of paying dower, but such dower arises out of intercourse due to *shubhah* and not the contract itself.

The major legal effect of an irregular contract, after consummation, is that the *ḥadd* of *zinā* is not awarded. This does not mean that *taʻzīr* cannot be awarded.

5.4 Removal of the Legal Effects

The methods of removal of legal effects of the valid and irregular contracts of marriage are basically four. These are ways in which the legal effects of marriage are removed resulting in separation (*furqah*) between husband and wife:—

(*a*) separation through divorce;

(*b*) separation without divorce;

(*c*) separation without the judgement of the *qāḍī*; and

(*d*) separation through the judgement of the *qāḍī*.

The details are as follows:

(*i*) **Divorce**—The first is through the different forms of divorce, express or through allusion. This is an independent subject and is dealt with separately in the next part.

(*ii*) **Li'ān**—In *li'ān* separation does not take place without the pronouncement of the judge. This is discussed in the section on *li'ān* in the next part.

(*iii*) **Exercise of option of puberty**—This is exercised by a minor, whether girl or boy, upon attaining puberty. It cannot take place without the pronouncement of the judge.

(*iv*) **Option exercised by the woman due to physical defect in husband**—This is separation through divorce. It takes place through the pronouncement of the judge. If a dower was named she is entitled to one-half of it, but if it was not named she is entitled to *mut'ah*.

(*v*) **Separation due to lack of equality of status or inadequacey of dower**—This takes place without divorce and the contract is treated as cancelled *ab initio* (*faskh*), but it takes place in the presence of the judge, as in the case of option of puberty.

(*vi*) **Refusal of husband to convert to Islam when the wife has converted to Islam in *dār al-Islām* or the reverse with the husband converting to Islam**—When the husband converts to Islam and both husband and wife were *Kitābīs* the contract is maintained and there is no separation. In case the wife converts, the husband is to be given a choice to convert, if he refuses the *qāḍī* is pronounce the separation between them, because a Muslim woman cannot be married to a non-Muslim even if he is a *Kitābī*. If both spouses were non-Kitābīs, the separation does not take place by the conversion itself and Islam has to be offered to the other spouse. If such spouse refuses to convert, the judge is to separate them.[42]

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[42] There are detailed rules for the religion of minor children, however, a non-Muslim cannot be a guardian of Muslim children.

(*vii*) Where an infant is married and the mother of the wife acts as a wet-nurse for the child. (separation without divorce)

(*viii*) Situation arising out of affinity and the female relatives of wife. (separation without divorce)

In all the above situations, the separation is irrevocable (*bā'in*).

Part II

THE BOOK OF *ṬALĀQ* (DIVORCE)

CHAPTER 6

DESCRIPTION OF ṬALĀQ (DIVORCE)

6.1 The meaning of ṭalāq and the general rule in the sharīʻah for ṭalāq

6.1.1 Literal meaning of *ṭalāq*

The word *ṭalāq* in its literal sense means release from confinement or imprisonment. It is derived from the word *iṭlāq* (اطلاق), which means "freeing," "liberation" and "releasing." The different words derived from this basic meaning are used in various senses through separate verbal forms, thus, it is like saying, "I released my camel," "I set free my prisoners," "I divorced my wife." The words *ṭalāq* and *taṭlīq* are used for a woman, while *iṭlāq* is used for other things. The underlying meaning of both is "the elimination of confinement." The word *ṭalāq* is equated with the English word "divorce" and is also used for a single pronouncement (repudiation), but the jurists often use the word *taṭlīqah* for the single repudiation. In its technical sense it means, "the removal of the permissibility of physical access, for which the woman entered into the contract of *nikāḥ*, when the prescribed three counts (repudiations) are completed."

6.1.2 The technical meaning of *ṭalāq* and irrevocability

The technical meaning is the same as the literal meaning. In its technical sense, *ṭalāq* (divorce) may be defined in two ways in order to highlight the aspect of irrevocability (*baynūnah*) where the word *bā'in* means "irrevocable." The first definition is: "the removal of the permissibility of physical access, for which the woman entered into the contract of *nikāḥ*, when the prescribed three counts (repudiations) are completed." This type of divorce creates enhanced or major irrevocability (*baynūnah kubrā*) and prevents remarriage to the wife without an intervening marriage. The second way alters this definition to state: "the removal of the permissibility of physical access, for which the woman entered into the contract of *nikāḥ*, when the prescribed three counts (repudiations) are *not* completed." This is the minor form of irrevocability (*baynūnah ṣughrā*) that permits remarriage without an intervening marriage.

6.1.3 The general rule for *ṭalāq*

The general rule for *ṭalāq* is that it is permitted to terminate the compact of *nikāḥ* when tempraments are incompatible, though it is considered a detestable act in the eyes of the *sharī'ah*. Permitted (*mubāḥ*) means no reason has to be assigned for divorce.

Some jurists maintain that *ṭalāq* is permissible only in case of extreme necessity, otherwise it is not permitted. They argue on the basis of a tradition that says, "The curse of Allah on who tastes[43] and divorces."[44] The upholders of this view provide other arguments as well. Imām al-Shāfi'ī says that all forms of *ṭalāq* are permitted without restriction or qualification. The view adopted by the Ḥanafī school is that *ṭalāq* is permitted though it is detestable. The verses "There is no blame on you if ye divorce women" [Qur'ān 2:236] and "O Prophet! When ye do divorce women, divorce them at their prescribed periods." [Qur'ān 65:1] indicate permissibility. In some reports marriage has been called slavery, but there are other reports in which *ṭalāq* has been called the most detestable thing: "The most loathesome of permissible things in the eyes of Allah is *ṭalāq*."[45] Accordingly, the rule preferred generally is that *ṭalāq* is permitted though it is considered a detestable act.

For the four methods of removing the legal effect of the contract of marriage see section 5.4 on page 72.

6.2 *The kinds of ṭalāq, women, and the preferred form of divorce*

Ṭalāq by way of description is of two types: *ṭalāq al-sunnah* (طلاق السنة) and *ṭalāq al-bid'ah* (طلاق البدعة). These types are also called *ṭalāq masnūn* (طلاق مسنون) and *ṭalāq makrūh* (طلاق مكروه). *Ṭalāq* or repudiation with respect to its finality is of two types as well: revocable (*raj'ī*) and irrevocable (*bā'in*).

Ṭalāq al-sunnah is viewed from two perspectives: from the perspective of time and from the perspective of number. The view from the perspective of number is based upon the distinction between free women and slave women, and is not mentioned here. *Ṭalāq* from the perspective of time is of two types: *ṭalāq aḥsan* (preferred form of divorce) and *ṭalāq ḥasan* (acceptable or passable form of divorce).

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[43] The word used is *dhawwaq*, that is, one who tastes things like a connoisseur.

[44] The tradition is found in *Majma' al-Zawā'id* by Haythamī, however, it is considered weak by some.

[45] It is recorded by many scholars including Abū Dāwūd though some consider it to be weak.

Women for purposes of divorce are of two types: free women and slaves. Each type is again divided into *ḥāmilāt* (those who are pregnant) and *ḥā'ilāt* (those who are not pregnant). Those who are not pregnant are of two types: those whose affair is determined on the basis of periods (*dhawāt ul-aqrā'*) and those whose affair is determined on the basis of months (*dhawāt ul-ashhur*).

6.2.1 *Ṭalāq aḥsan* and its rules

The preferred form of divorce or *ṭalāq aḥsan*, for a wife whose affair is governed by periods, is when the husband pronounces a single revocable (*raj'ī*) repudiation in the period of purity, between two menses, when he has not had sexual intercourse with such wife during this period of purity, after which he does not have intercourse with her till her waiting period is over. This form of divorce was preferred by the Companions of the Prophet (God be pleased with them).

The preferred form of divorce or *ṭalāq aḥsan*, for a wife who is pregnant, is when the husband pronounces a single revocable (*raj'ī*) repudiation with the knowledge that she is pregnant, and then does not have intercourse with her till she completes her waiting period with the delivery of the child. He may repudiate her even though he has had sexual intercourse with her and pronounces the repudiation after such intercourse.

The preferred form of divorce for the woman who has had her menopause and no longer menstruates (one whose affair is determined by months) is similar to the form for the pregnant woman, except that she completes her waiting period at the end of the third month.

A woman who has irregular periods of purity, due to some ailment or because she is close to menopause, is divorced with a single repudiation under the *sunnah* form, and she is treated like those whose affair is based upon periods.

6.2.2 *Ṭalāq ḥasan* and its rules

The *ḥasan* form of divorce, for a wife whose affair is governed by periods, is when the husband pronounces a single revocable (*raj'ī*) repudiation in the period of purity, between two menses, when he has not had sexual intercourse with such wife, after which he does not have intercourse with her and pronouces the second revocable divorce in the next period of purity without intercourse in that period and finally pronouces the third repudiation in the third period of purity. Following the third repudiation the woman completes her waiting period when she menstruates.

The *ḥasan* form of divorce, for a wife who is pregnant, is when the husband pronounces a single revocable (*raj'ī*) repudiation with the knowledge that she is pregnant, waits for the next month and pronounces the second repudaition followed by the third repudiation in the third month. For the divorce to be effective he is not to have intercourse with her after the first repudiation. The woman completes her waiting period with the delivery of the child. There are jurists who maintain that this form of divorce for the pregnant woman is futile as the purpose is the vacation of the womb, and the same result is achieved with the *aḥsan* form of divorce for such a woman.

The *ḥasan* form of divorce for the woman who has had her menopause and no longer menstruates (one whose affair is determined by months) is similar to the form for the pregnant woman in the *ḥasan* divorce, except that her waiting period is worked out on the basis of months.

6.2.3 Words used for the *sunnah* form of divorce and the role of intention

Words used for the *sunnah* form of divorce, that is, *ṭalāq aḥsan* and *ṭalāq ḥasan* are of two types: *naṣṣ* (explicit in the meaning of divorce) and *dalālah* (implication; equivocal or ambiguous in meaning).

The use of *naṣṣ* is like a husband saying to his wife, "You are divorced in accordance with the *sunnah*," when the husband has not formed an intention. If the woman is one whose affair is determined by periods, this will amount to a single repudiation if she is in a period of purity in which no intercourse has taken place.

Illustrations

1. If she was in her menstrual period or the repudiation was pronounced in a period of purity in which intercourse had taken place, the repudiation will not become effective at once, but will become effective when she has passed through another period of menstruation and has attained purity. This is due to use of the word *sunnah*, which prevents such repudiation to be transferred to the *bid'ah* (innovative form).
2. If he had formed an intention, while using the above words, to the effect that these will be three repudiations, then they are to be treated as the *ḥasan form* in which one revocable repudiation is pronounced in every period of purity.

3. If he had formed an intention that this is a single irrevocable repudiation, then it will not be construed as such, because the *sunnah* form does not accept an irrevocable repudiation.
4. If he had expressly stated, "You are divorced 'thrice' in accordance with the *sunnah*," without forming an intention, then it will be treated as the *ḥasan* form with each revocable repudiation taking effect in a separate period of purity. If, however, he had intended all three to take effect at once, the divorce will be valid, but it will not longer be the *sunnah* form.
5. The above views apply to the pregnant woman as well according to Abū Ḥanīfah and Abū Yūsuf. Imām Muḥammad says it amounts to a single revocable repudiation.

Dalālah or divorce by implication is like saying, "You are divorced through": *ṭalāq al-'iddah* (divorce of the waiting period), *ṭalāq al-'adl* (divorce of justice), *ṭalāq al-dīn* (divorce of religion), *ṭalāq al-Islām* (divorce of Islam), *ṭalāq al-ḥaqq* (divorce of Truth), *ṭalāq al-Qur'ān* (divorce of the Qur'ān), or *ṭalāq al-Kitāb* (divorce of the Book). All such forms are construed to mean one of the *sunnah* forms of divorce depending on the facts of each case.

6.2.4 *Ṭalāq bid'ah* or the deviant form of divorce

The *bid'ah* form of divorce is usually considered to be of two types, but a third type can also be identified. The first two types are : divorce depending upon time; and divorce depending upon number.

The type depending upon time is as follows:

(*a*) A single revocable repudiation pronounced in the woman's state of menstruation when marriage has been consummated with her.

(*b*) A single revocable repudiation pronounced in a period of purity in which sexual intercourse has taken place between husband and wife.

The type depending on number is the pronouncement of two or three repudiations in a single period of purity. The use of the words "twice" or "thrice" in a single statement is the same as two or three separate statements saying, "You are divorced," as long as the repudiations are to have effect in a single period of purity.

The words used are those that either imply the deviant form of divorce or are clear statements implying number. The word *sunnah* used to qualify such statements can alter meaning of such statements. (As in the section above)

The third type of deviant divorce occurs when divorce in the *aḥsan* or *ḥasan* is qualfied as irrevocable (*bā'in*) instead of revocable (*raj'ī*). Irrevocability linked to *khul'* or divorce prior to consummation is not treated as *bid'ah* (deviation), and is considered to conform to the *Sunnah*.

The deviant forms of divorce, although disapproved, do take effect according to most jurists. The Shiah school maintains that they do not have any legal effect.

CHAPTER 7

ESSENTIAL ELEMENT OF *ṬALĀQ* AND ITS CONDITIONS

7.1 *There is a single element of ṭalāq and a number of conditions associated with the element*

The single element of *ṭalāq* are the words that convey the literal meaning of *ṭalāq*, which is separation, release, removal of confinement, or that convey the severance of relationship by way of allusion. Legally, both forms amount to the removal of the permission of physical access to the woman.

The words used may also indicate the number of pronouncements, if more than one is intended. A fraction of one *ṭalāq* is treated as one whole *ṭalāq* or repudiation.

A number of conditions are associated with the element that affirm the legal effectiveness of the words used and the different forms that arise out of the way in which the words are used. The conditions and the situations arising out of them are as follows:—

(*a*) **Conditions that pertain to the husband:** The conditions that pertain to the husband are about: his legal capacity to pronounce *ṭalāq*; the significance of his intention in the words he has used; the pronouncing of divorce through letter or through gestures; the doubts about the pronouncement of *ṭalāq* and number of repudiations; and the doubt surrounding the absence of the husband when he goes missing. For the details of these conditions, see §7.2.1 to §7.2.4. It is also to be noted that it is the words used by the husband that give rise to *tafwīḍ* and *tamlīk* as will be explained below.

(*b*) **Conditions that pertain to the wife:** Conditions pertaining to the wife deal mostly with different stipulations that make divorce contingent upon the happening of events. The events may depend upon the acts of the wife ("If you leave the house, you stand divorced"), the husband ("If I enter this door you stand divorced"), third persons or merely physcial events. Some of these stipulations are considered valid by the jurists. As the stipulations arise from the husband, they may give rise to oaths resembling *īlā'* (vow of continence) and *ẓihār* (saying "You are like the back of my mother"). These are considered separately. One of the main situations pertaining to the wife is the acceptance by the wife of a divorce in exchange for wealth or relinquishment of financial claims. This gives rise to *khul'* and related forms of release, which are discussed below (See §7.3.1 to §7.3.2.2).

(*c*) **Conditions that relate directly to the essential element:** This is a single condition that no "exception" should prevent the occurrence of *ṭalāq*. The exception may occur in the form "I divorce you with three repudiations, except one." The other type is when the husband says, "You are divorced thrice, God willing." Such statements may also give rise to stipulations. The details are not discussed here.

(*d*) **Conditions that pertain to time:** Here too there is a single condition of time and this is the time associated with the form of divorce called "*īlā'*." For the discussion of *īlā'*, see §7.5.

7.2 Conditions Pertaining to the Husband

7.2.1 Conditions pertaining to the legal capacity of the husband for pronouncing *ṭalāq*

The husband pronouncing divorce must be a major and must be sane because the divorce pronounced by an insane person, by an idiot or by a minor is of no legal effect.

1. **Intoxication:** The divorce pronounced by a person who is intoxicated voluntarily is valid, but the pronouncement by one who is intoxicated as a result of medication or *bhang*[46] is of no legal effect. If he was compelled to take an intoxicant or did so under duress, his pronouncement of divorce is not valid.
2. **Temporary loss of senses:** Words amounting to a pronouncement of divorce uttered by one who has fainted, or has lost his senses temporarily due to some reason is of no legal effect, if the words are uttered in such a state.

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[46] The use of *bhang* is considered permissible according to some jurists.

3. **Coercion:** A divorce pronounced by a person under coercion is valid and effective.

4. **Jest:** A divorce pronounced explicitly by a person by way of jest is legally valid and effective.

5. **Mistake:** A divorce pronounced explicitly by a person by mistake is legally valid and effective.

6. **Dumb person:** A divorce pronounced by a dumb person by means of writing or meaningful gestures is valid.

7. **Divorce with an option:** A divorce pronounced with an option or made contingent upon the happening of an event is valid.

8. **Health of husband:** Health is not a condition and divorce pronounced by a person who is ill is valid. Thus, a divorce pronounced during *maraḍ al-mawt* (terminal illness) is valid.

9. **Islam:** It is not necessary that the person pronouncing divorce be a Muslim; a divorce pronounced by a non-Muslim is valid.

10. **Husband in doubt about divorce or number:** When the husband is in doubt whether or not he pronounced divorce the presumption is that he did not. If he is in doubt about the number whether it was one repudiation, two or three, it is to be presumed that he pronounced it once. If he is in doubt as to whether it was a revocable or an irrevocable prouncement, it is to be presumed that it was revocable.

11. **Husband missing (*mafqūd*):** The death of a husband who is missing cannot be presumed, unless there are confirmed reports about his death. The basis is the general rule in Islamic law that something that was known with a certainty (his being alive) cannot be done away with doubt (conjecturing that he must be dead). As life does come to an end, Abū Ḥanīfah is said to have fixed this period at ninety-nine years (120 minus 21). The Dissolution of Muslim Marriages Act, 1939 fixes the maximum period of life for the *mafqūd* (missing person) at four years. This overturns a large number of rulings based upon the said general principle as well as the doctrine of presumption of continuity (*istiṣḥāb al-ḥāl*). A person in a state of coma may possibly be linked with the *mafqūd*.

7.2.2 The words used for pronouncing *ṭalāq* and the relevance of the intention of the person pronouncing divorce

When the words used to pronounce divorce are explicit and convey the meaning of divorce in clear terms, that is, the words are *sarīḥ*, it is the meaning of the terms used that is relevant and the intention of the husband is not taken into account. If divorce is pronounced in indirect terms, through allusion (*kināyah*), and by using figurative meanings, the validity of the pronouncement may in certain cases depend upon the ascertainment of the intention of the husband pronouncing divorce.

The *ṣarīḥ* words that convey a clear meaning of divorce are *ṭalāq* (divorce), *taṭlīq* and its direct derivatives. It is like saying, "You are divorced," "I have divorced you," and such words that convey the meaning clearly to one who is listening. The objective meaning is relevant and intention is not to be referred to when such meanings are clear. If a person uses such words and then denies that he did not intend divorce, his denial is of no relevance.

The words used by way of *kināyah* (allusion) can lead to a large number of statements that can in certain cases be construed to mean *ṭalāq*, but can mean something else too. These are statements like, "You are *bā'in* (separated)," "You are set free finally," "Your affair is in your hands," "You choose," "I am not standing in your way," "I have granted you *khul'* (but does not mention the counter-value)," "There is no *nikāḥ* between you and me," "You are a free woman," "Go join your relatives," "I have no means of approaching you," "Vacate you womb," and statements of this nature. These statements have double meanings. They are to be related to the context and then interpreted. The statements are divided into three types:

(*a*) Statements like "Your affair is in your hands," "You choose," "Vacate you womb," and "You are all alone" are usually not used in anger by way of abuse and if the context is that of divorce they become even clearer. Intention may be ignored in such cases if the context indicates that divorce was intended, in which case the words are construed as direct expressions of divorce. Statements like "Your affair is in your hands" and "You choose" give rise to the delegation of the right of divorce to the wife, for which see §7.2.4.

(*b*) The second type include statements that may amount to hurling of abuses even though they may be construed to mean divorce. These are statements like "You are *ḥarām*," "You are *bā'in*," or terms that can be used as abuses in anger or otherwise. In such cases, intention is taken into account along with the context in which the statements were made. In other words, the construction placed upon the statement may go against the claim that divorce was not intended.

The third type includes all other statements. It is the intention of the husband that will be taken into account and a claim made by the husband that he did not intend divorce will be deemed credible in a court of law. *Divorce in writing.*—If the words of divorce are stated with a named addressee the letter or text is to be construed as a divorce. If no addressee is named, the document cannot be construed as divorce without intention. The Muslim Family Laws Ordinance prescribes that every divorce shall be recorded in writing and will be communicated to the wife in accordance with the prescribed procedure. The requirement also does away with the distinctions drawn in subsections (1) to (3), but not completely. The Ordinance also does not talk about the period of purity in relation to divorce sent in writing; it, therefore, cannot be considered as being in complete conformity with the *sunnah* form of divorce.

7.2.3 The impact of the different kinds of statements used for divorce; meaning of revocable (*raj'ī*) and irrevocable (*bā'in*) forms of divorce

The impact of divorce pronounced by way of direct or indirect expressions (*ṣarīḥ* or *kināyah*) described in the previous section is of two types: (a) revocable (*raj'ī*) and (b) irrevocable (*bā'in*).

Explicit revocable divorce (*ṣarīḥ raj'ī*) is divorce after consummation of marriage that is not linked to a counter-value (compensation) nor does it specify the number of three repudiations, whether expressly or by implication, and does not in any way convey the meaning of irrevocability.

Explicit irrevocable divorce (*ṣarīḥ bā'in*) is the opposite of the explicit revocable divorce, that is, it uses words that convey irrevocablility (*baynūnah*).

(*a*) When divorce is linked to the number three or is pronounced thrice, it amounts to an irrevocable divorce.

(*b*) Irrevocable divorce is also divorce that uses explicit words of divorce prior to consummation of marriage. If the husband claims that there was proper seclusion with the woman but he did not have intercourse with her, the divorce will still be irrevocable.

(*c*) Where an irrevocable divorce is linked with compensation or counter-value in terms of wealth it amounts to *khul'*, for which see §7.3.1. *Khul'* (pronounced as *khul'a* sometimes) is divorce in return for money and is irrevocable. In reality, it is a contract between two parties.

(*d*) If divorce is pronounced once or is linked to the number one by indication or implication it amounts to one revocable divorce. If it is pronounced once and expressly stated to be irrevocable, it amounts to a single irrevocable divorce. It is also irrevocable if he indicates through words or some other way that it is the worst or most severe type of divorce. If, however, the husband states that it is one divorce of the *bid'ah* form, it will amount to a single revocable divorce because *bid'ah* divorce is also one that is given during the menstrual period of the wife.

(*e*) The three forms of *kināyah*—"Prepare to rely on yourself," "Vacate your womb," and "You are all alone"—amount to a single revocable divorce. All other forms of *kināyah* will amount to repudiations that are irrevocable.

7.2.4 *Tafwīḍ* and *tamlīk* or delegation of the right of divorce

Tafwīḍ literally means "delegation" or "delegation of authority" but the word *tafwīḍ* used in the context of marriage is transfer of ownership (*tamlīk*) of the right of divorce. Once granted the right cannot come back as in the case of any property transferred, that is, the right cannot be revoked like agency. It is also interpreted as a stipulation (*ta'līq*) in the contract, whether stipulated at the time of the contract or later, and a stipulation expressed in unqualified terms is not revoked . As the husband owns multipe occurrences of this right, he still retains the right of divorce even after transferring the right to his wife by way of *tafwīḍ*. The transfer is binding (*lāzim*) as far as the husband is concerned and he cannot revoke the transfer. The transfer is not binding as far as the wife is concerned and she is granted an option of exercising the right or rejecting it by choosing her husband or married life or simply by refusing to exercise the right.

The statements used for transferring the right are: "Your affair is in your hand," "Choose (yourself)."[47] These words can be used at the time of the contract or at any other time during the subsistence of the marriage contract. The statements can be interpreted to mean divorce and other things, therefore, it is essential that the intention of the husband be made clear. Column 18 of the prescribed *nikāhnama* (Form II) clearly specifies whether the right to divorce is being delegated.

Duration of power.—A power delegated in unqualified or absolute terms lasts till the session of the contract (the wedding ceremony). The power may also be made dependent on time to last for a certain period, which may extend to the lifetime of the woman. The delegation of the power can also be made contingent upon the happening of an event. The power may also be delegated with the words "whenever you like" in which case it will have the same effect as lasting during the lifetime or till such time that it is exercised. Form II, mentioned above, is not very clear about the duration of the power delegated.

Exercise of power by wife.—The excercise of the power by the wife depends upon what has been delegated by the husband, whether a single repudiation or more and whether revocable or irrevocable. Form II is not clear about the details in which the right is delegated. It is, however, provided that when a woman exercises this right the same procedure will be followed as is followed in the case of a divorce granted by the husband. It will be better if the words "whenever you like and as you like" are provided in the form. Further, it is not clear whether the husband will have the right of *rujū'* (recourse) after the wife has exercised her right as provided in Form II or whether it will depend upon mutual reconciliation according to the procedure provided.

Delegation to a third person.—When the right to divorce is delegated to a third person it amounts to agency and not transfer of the right of divorce. Delegation to a third person can be revoked.

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47. The jurists make a distinction between the two forms, but this distinction is not adopted here. The main distinction is that the word "Choose" cannot apply to triple divorce at once.

7.3 Conditions Pertaining to the Wife (Khul') Pronounced Khula in Pakistan

7.3.1 The general framework of *khul‘* and *mubāra’ah*

Khul‘ and *mubāra’ah* are understood in relation to statements of the husband and wife pertaining to the kind of arrangement to be undertaken for effecting separation and the kinds of payments to be made or claims to be discharged or waived.

The statements that give rise to the arrangements of release are as follows:—

(*a*) The husband uses the term *khul‘*, but does not mention a counter-value (amount) to be paid by the wife for doing so.

(*b*) The husband or wife, as the case may be, uses the term *ṭalāq* (not *khul‘* or *mubāra’ah*), but in lieu of an amount to be paid by the wife.

(*c*) The husband or wife, as the case may be, uses the term *khul‘*, but in lieu of an amount to be paid by the wife or a claim to be forgone by her whether this amount pertains to the dower or something else.

(*d*) The husband or wife, as the case may be, uses the term *mubāra’ah* without mentioning claims beyond the implication of *mubāra’ah* or by mentioning such additional amounts or claims.

The amounts or claims that may be involved in these arrangements may relate to one or more of the following:—

(*a*) Claims arising out of the contract of *nikāḥ* like dower and past maintenance.

(*b*) Claims arising from transactions other than the contract of *nikāh*, like property jointly purchased, debts owed to each other and other financial transactions.

(*c*) An additional amount mentioned in the separation agreement that does not fall within (a) or (b) above.

(*d*) Maintenance to be provided to the wife during her waiting period following *khul‘* or other arrangement.

(*e*) Residence to be provided to the wife during her waiting period following *khul'* or other arrangement.

Disagreements among Abū Ḥanīfah and his two disciples in the case of *khul'* and *mubāra'ah*: Some of the jurists agreed that where the husband uses the term *khul'* ("I grant you *khul'*"), but does not mention a counter-value (amount) for doing so, it amounts to divorce if the husband intended divorce, because the term *khul'* is *kināya..* for divorce and is in need of intention. If the husband did not intend divorce by this term, it amounts to nothing and has no legal effects. Abū Ḥanīfah's view differs from this view, because he always assumes that the term *khul'* implies the dropping of certain claims (but his view on the issue is not implemented here). Neverthless, the term *khul'* has come to assume the technical meaning of divorce in lieu of financial return, therefore, if a person appoints an agent to negotiate *khul'* and the agent grants *khul'* without any payment in return, it is not valid. If the husband grants *khul'* in lieu of payment and then turns around to say that he did not intend divorce, his assertion is not admissible and divorce will take place.

The three jurists disagreed about *khul'* and *mubāra'ah*. Imām Muḥammad maintained that the two were similar. He even considered the situation where the husband or wife, as the case may be, uses the term *ṭalāq* in lieu of an amount to be paid by the wife to be similar to *khul'* and *mubāra'ah*. In all these, he said, *what is named as compensation in the contract is to be paid.* Abū Ḥanīfah also considered *khul'* and *mubāra'ah* to be similar, but he said that they mean *the extinction of all claims arising out of the contract of nikāḥ, whether the claims belonged to the wife or the husband, but the claims arising from transactions outside the contract of nikāḥ were not included.* In other words, he said that the terms *khul'* and *mubāra'ah* when used in their absolute or unqualfied sense implied the extinction of certain claims. If they did not imply such extinction of claims there was no point in using these terms and the term *ṭalāq* could easily be used in association with financial compensation to the husband. As these terms imply aversion of the parties for each other, the termination of the bond must mean termination of all pending claims arising as a result of marrigage. In fact, Muḥammad is saying exactly this that there is no point in using these different terms, they all mean *ṭalāq* with financial compensation. Abū Yūsuf had the same opinion as Muḥammad with respect to *khul'*, but for *mubāra'ah* he sided with Abū Ḥanīfah.

Where an opinion is supported by two Imāms that opinion is the law. This means that the views of Abū Yūsuf are the law on this issue. This law is stated below.

7.3.2 The preferred law about *khul'*, *mubāra'ah* and divorce for money

Khul', *mubāra'ah* and *ṭalāq* in lieu of money are all contracts for a counter-value depending upon the consent of the parties. The consent is expressed through offer and acceptance. According to most jurists, the contracts, therefore, take effect even if the parties do not appear before a *qāḍī*. It is, however, common practice now to appear before the court for affirmation. All these contracts result in a single irrevocable divorce (*bā'in*).

From the perspective of the husband these are contracts contingent upon acceptance by the woman. The session of the contract is the session of the woman, thus, an offer made by the husband is not terminated if he moves away from the session prior to acceptance by the woman. The session of the woman begins when the offer reaches her. The position is reversed where the offer is made by the woman. These contracts made under coercion and in a state of intoxication from prohibited intoxicants are valid, but those made in a state of intoxication from permissible intoxicants or in a fit of fainting are not valid.

The amount named in the contracts must be marketable wealth for a Muslim.

7.3.2.1 MEANING AND RULES OF *KHUL'*, AND DIVORCE FOR MONEY

The literal meaning of *khul'* (*khula'*) is removing or taking off, like taking off a glove or shoes. In its technical sense, it means agreement by the wife to pay compensation for terminating the contract of marriage.

Khul' is of two kinds: *khul'* without compensation and *khul'* with compensation. *Khul'* without compensation is like the husband saying, "I grant you *khul'*" but he does not mention any amount as compensation. Here the term *khul'* used by the husband is treated as a *kināyah* for divorce. Thus, it is his intention that will be taken into account. If he intended one repudiation it will be treated as one, but if he intended three repudiations, they will be treated as three. In other words, *khul'* without compensation is treated as *talāq* through a *kināyah*.

Ṭalāq in lieu of compensation is the same as the second type of *khul'*, that is, *khul'* with compensation.

In *khul'* and *ṭalāq* in lieu of money, the husband is entitled only to that amount which is named in the contract. This amount may include the dower amount or any amount in addition to this, but all such amounts have to be expressly stated in the terms of the agreement. If the amount stated does not pertain to dower or claims of maintenance, these claims will stay as they are and will not be waived.

Maintenance during the waiting period is a claim that arises after the divorce resulting from *khul'*, but the husband can expressly claim waiver from this in the agreement. Provision of residence during the waiting period also arises after the divorce, but this cannot be made part of the agreement of *khul'* as it is a right of Allah, and must be provided by the husband irrespective of the agreement.

7.3.2.2 MEANING AND RULES OF *MUBĀRA'AH*

The literal meaning of *mubāra'ah* is derived from *barā'ah*, which means to "absolve someone of all liability," "to write off," "to remove liability for all claims." In its technical sense, the term *mubāra'ah*, without additional stipulations, means freedom from all claims arising from the contract of *nikāḥ*. Thus, payment of dower and past maintenance for the woman are included in this meaning.

If no other amounts are expressly mentioned, the term *mubāra'ah* used in the contract will mean dropping of all claims of dower and maintenance prior to the contract. The result will be an irrevocable divorce.

Where the term *mubāra'ah* is used for the contract and the husband stipulates the payment of an additional amount, all existing claims arising from the marriage contract pertaining to dower and prior maintenance will be waived, and the wife will be liable to pay the amount stipulated. Thus, if the husband demands 1000 dinars in a contract of *mubāra'ah* and an amount on account of dower stands unpaid, the wife is not entitled to such dower amount and will be liable to pay 1000 dinars. If the dower has been paid in full or in part, the wife will not be required to return the dower amount she took into possession. This rule will apply whether or not the marriage has been consummated.

Maintenance during the waiting period is a claim that arises after the divorce resulting from *mubāra'ah*, but the husband can expressly claim waiver from this in the agreement. Provision of residence during the waiting period also arises after the divorce, but this cannot be made part of the agreement of *mubāra'ah* as it is a right of Allah, and must be provided by the husband irrespective of the agreement.

It is to be stated here that the statement in Mulla's Code, §319(3) that "When the aversion is on the side of the wife, and she desires a separation, the transaction is called *khula*. When the aversion is mutual, and both the sides desire a separation, the transaction is called *mubara'at*," has no legal basis in traditional Islamic law.[48] The offer may be made by the wife or the husband, likewise the acceptance.

7.4 The Meaning Attributed to Khul' by the State

We may quote Rashida Patel to give the background due to which changes have been made through case law and statute that affect the traditional law of *khul'*. She says: "The husband usually refused to grant Khula to the wife and in order to defeat this right, the husband claime huge compensation for Khula, often making false allegations of having given the wife huge sums in the shape of jewelry and property and even claiming the property in the name of the wife as belonging to him. This placed a lot of strain on the judges for such cases required heavy sifting of evidence thus leading to lengthy procedures."[49]

7.4.1 The law developed for *khul'*

In *Mst. Khurshid Bibi v. Baboo Muhammad Amin*, the learned Supreme Court laid down that if reconciliation between husband and wife failed, the court could decide the case on its own and grant *khul'*.[50] The Court said: "Similarly, the wife is given the right to ask for khula in cases of extreme incompatibility though the warning is conveyed by ahadith against too free exercise of this privilege."[51] To cut down the time-delays and lengthy procedures, §6 of the Family Courts (Amendment) Ordinance, 2002 (Ordinance LV of 2002) amended §10 of the Family Courts Act, 1964 to the effect that "the family court in a suit for dissolution of marriage, if reconciliation fails, shall pass Decree for dissolution of marriage forthwith and shall restore to the husband the mehr received by the wife in consideration of the marriage at the time of marriage."

The Court arrived at the above decision although it is clearly written in Mulla's Code that both *khul'* and *mubāra'ah* are agreements between the parties (§319).

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[48] In fact, the distinction between *khul'* and *mubāra'ah* given in Mulla's Code is somewhat confusing. The same distinction may be found with Amir Ali as well.

[49] Mrs. Rashida Mohammad Hussain Patel, *Family Laws and Judicial Perceptions* (2007).

[50] *Mst. Khurshid Bibi v. Baboo Muhammad Amin*, PLD 1967 SC 97.

[51] Ibid.; An earlier case was *Mst. Balqis Fatima v. Naiam-ul-Ikram Qureshi* PLD 1959 (W.P.) Lah. 566.

7.4.2 *Khul'* has been turned into an umbrella ground for a woman seeking divorce

As a result of the above judgement *khul'* has become a generic ground for a woman seeking divorce, and has become equivalent to "divorce" sought by a wife. Courts have acknowledged all kinds of reasons for granting *khul'*. Among these are "determination of wife not to live with husband,"[52] "hatred against husband,"[53] "failure of reconciliation,"[54] "disparity of age" or "age difference,"[55] "allegation of danger to life,"[56] and a host of other reasons. In other words, *khula* appears to have become the equivalent of "divorce" or *ṭalāq*. It is for this reason that people are heard saying "you can seek khula" or "I will seek khula" instead of saying "I will seek divorce or *ṭalāq*."

All this will surely result in the destruction of *fiqh*.

7.4.3 Comments on the developed law

This is not the proper occasion for a detailed evaluation of the case law on the issue. We will, therefore, list only a few objections on the basis of the traditional Ḥanafī law described above:

7.4.3.1 A FEW OBJECTIONS TO THE LAW DEVELOPED BY THE STATE

1. *Khul'* and *mubāra'ah* are both contracts that depend upon offer and acceptance issued voluntarily by the parties, as in all contracts. No one can force anyone to enter into a contract, especially not a court of law.

2. In both contracts, the judgement of the *qāḍī* is not required. Recourse to the *qāḍī* is only for granting legal affirmation to or confirmation of the contract.

3. As the contract is taken to the *qāḍī* for confirmation alone, the "cause of action" does not arise until the contract is concluded. Reconciliation is not needed during negotiations for such a contract or even after its conclusion.

4. The learned Court referred to a number of traditions, but in none of these traditions the Prophet (pbuh) passed judgement, he merely

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[52] PLD 1983 Lah. 549; PLD 1983 SC 169; PLD 1978 Lah. 1109.

[53] 1989 MLD 3349.

[54] 1999 MLD 1679; 1986 CLC 1996.

[55] 1984 CLC 1389 (Lah.); 1989 MLD 425.

[56] 1985 CLC 2540.

asked the husband to grant divorce or the wife to go back to the husband. The final decision rested with the parties themselves.

5. The learned Court mentions "aversion" as the basis. Aversion cannot be a basis in those cases where the husband and wife are permitted to see each other prior to marriage. There may be cases where the wife is married away to a man she has never seen, but these are few today. The law, however, is made for the usual cases. "Extreme incompatibility" and "aversion" result from something else, like cruelty, false accusations and so on. The real causes of averion should be the grounds of seeking divorce, and not aversion itself. Some of these causes are mentioned in the Dissolution of Muslim Marriages Act, 1939.

It is suggested that the learned courts and the State should find some other grounds for developing a right of divorce for the wife. Changing concepts that are not meant to serve this purpose will distort the traditional law unnecessarily.

7.4.3.2 THE OBVIOUS UNDERLYING WISDOM OF *KHUL'* AND *MUBĀRA'AH*

After having said all the above, we must try to recognize the underlying wisdom of the contracts of *khul'* and *mubāra'ah*. We have stated above that *khul'* and *mubāra'ah* are contracts in which the use of these words without additional stipulations or qualifications implies a certain minimum with respect to claims and waivers. The parties are at liberty, however, to make additional stipulations for other amounts or for claims pertaining to common and shared property.

The truth is that these contracts are not dispute oriented, they are based on mutual respect and amicable settlement between husband and wife who decide that they cannot live together and must separate. If they have joint property or even common property, it can be divided through mutual agreement. Some of these financial entanglements may be complex. This is where additional stipulations come in, over and above the basic implications of the words *khul'* and *mubāra'ah*. The contracts provide a means to an arrangement that helps the parties to come to a settlement without recourse to adversary proceedings in court. The contracts also help avoid time-consuming and nerve-wracking post-divorce disputes over common or shared property.

The contracts may also be based upon mediated settlement between spouses. This is not difficult to conceive and is a matter of daily occurrence in the West where lawyers sit with the parties and come to a settlement amicably, peacefully and through amicable negotiations. The contracts of *khul'* and *mubāra'ah* are also meant for an out-of-court settlement.

Where the parties are at daggers drawn, or the husband is being aggressive and is mean to the wife, and even refuses to divorce her, the remedy must be something else and not these contracts. It is this "something else" on which the courts and lawmakers should focus for providing remedies in such cases through courts.

7.5 Condition Pertaining to Time (*Īlā'*)

7.5.1 The meaning of (Īlā')

The literal meaning of *Ilā'* is "oath." In its technical sense, it is an expression for an oath that prevents sexual intercourse with a lawfully wedded wife. In the days of Jāhiliyyah (ignorance), it was a form of divorce. The *sharī'ah* has, therefore, deemed it "delayed *ṭalāq*."

When a person swears an oath that he will not have sexual intercourse with his wife ever, or even when he does not use the word ever, then he has sworn the oath of *Ilā'*. Where the husband uses the oath for a specified period that is less than four months, or implies a duration that is less than four months, the oath is not deemed *Ilā'*.

Where the husband repeats the oath of *Ilā'* several times in the same session, it will be treated as a single oath. The violation of the oath will lead to a single expiation in such a case.

The period of four months of *al-īlā'* is to be reckoned in days and is 120 days.

7.5.2 Retraction of Īlā' and consequences

If, after the oath of *Ilā'*, he has actual physical sexual intercourse with his wife, or takes her back by the use of words when he is physically or legally unable to have actual intercourse, in a period that is less than four months from the time of swearing of the oath, he is said to have committed recourse (*rujū'*) and violated the oath. Where it is possible for the husband to have actual sexual intercourse with his wife, any physical contact less than that will not amount to recourse. Upon recourse and violation of the oath, the husband becomes liable for expiation (*kaffārah*) to be made for the violation of an oath.

7.5.3 Effect of non-retraction of Īlā'

If the husband does not have recourse to his wife, who was the subject of the oath, as described above, within a period of four months, the wife stands divorced irrevocably through one repudiation (*bā'in*). It is as if the oath was expressed in the following words, "If I do not have intercourse with you for the next four months, you stand divorced irrevocably once."

If there is no *rujū'* in four months it will result in one irrevocable repudiation. The wife will undergo *'iddah* (waiting period), which will commence from the date the repudiation becomes effective.

The divorce becomes operative upon the completion of the period of four months, and its effectiveness does not depend upon the decision of the *qāḍī*. It is Allah Almighty who heard his oath of *Ilā'* and it is He who also heard the injury that the husband intended to inflict upon his wife. Nevertheless, the wife may be constrained to take her case before the *qāḍī*. If the words used for the oath were ambiguous and he claims before the *qāḍī* that he did not mean abstention from sexual intercourse, he is to be deemed truthful by the *qāḍī*.

7.6 Additional Forms of Divorce (Ẓihār and Li'ān)

7.6.1 *Ẓihār*: meaning and conditions

Ẓihār (injurious assimilation) is an oath through which the husband compares his legal relationship with something prohibited thus denying his wife the right of cohabitation. The basis of this oath is the statement of the husband, "You are for me like my mother's back." The comparison drawn with any of the females who are perpetually prohibited for the husband will have the same effect.

The oath can be pronounced by anyone who is a major, actually or legally sane. The oath of *ẓihār* cannot be validly pronounced by an insane person, a minor, an idiot, one who is not in his senses, is asleep or has fainted and a person suffering from leprosy. The *ẓihār* pronounced by a person who is intoxicated takes the same rule as that in *ṭalāq*. The jurists also state that *ẓihār* cannot be pronounced by a non-Muslim, but al-Shāf'ī disagrees. There is a disagreement among the jurists whether a woman can pronounce *ẓihār*, but the preferred rule is that she cannot.

The oath of *ẓihār* is of two types: unrestricted by time and restricted by time. The oath restricted by time may be for a day, a week, month and so on. When the time is over the oath lapses and there is no liability of expiation for the husband. When the oath is not for a specified period, it can be terminated through recourse to the wife and expiation.

Where the expressions used are clear about the meaning of *ẓihār* and the comparison drawn is clear, the oath will be construed to mean *ẓihār* and *ẓihār* alone. If expressions like "You are prohibited for me like my mother" are used, they will depend upon the intention of the husband whether he intends divorce or *īlā'*. If the husband says, "You are like my mother" the initial construction will be that of respect like his mother, unless he denies this and says that he meant *ẓihār*.

The oath of *ẓihār* prohibits intercourse with the wife including touching, kissing and fondling. The jurists, therefore, consider this oath to be an offence as it deprives the woman of what rightfully belongs to her. Accordingly, she has the right to approach the court for the restitution of her rights and the *qāḍī* can compel the husband to break his oath and to restore her rights. The jurists do not state this, but it is obvious that if the husband refuses to grant the woman her rights the *qāḍī* can separate them through divorce.

The husband can approach the woman after breaking his oath and offering expiation. If he has intercourse with her prior to this, he is to seek forgiveness from Allah and offer the expiation. If he had pronounced a number of oaths in different sessions, expiation in the same number has to be offered.

7.6.2 *Li'ān*: meaning and conditions

Qadhf is of two types: accusation of unlawful sexual intercourse (*zinā*) and denial of paternity of the child by husband. If the husband accuses his wife of *zinā*, then they have to follow the procedure of *li'ān*. The *qāḍī* will ask the husband to swear an oath four times: "I testify by Allah that I am truthful in accusing her of *zinā*." He will then swear a fifth time: "The curse of Allah be on me if I am untruthful in accusing her of *zinā*." The *qāḍī* will then order the woman to swear four times: "I testify by Allah that he is untruthful in accusing me of *zinā*." She will then swear the fifth time: "The wrath of Allah be on me if he is truthful in his accusation of *zinā* against me." The wife stands absolved of the charge if she swears these oaths. If the accusation pertains to the denial of paternity of the child, the statements of the husband and wife will be altered to include the words "denial of paternity" in place of the words "accusation of *zinā*."

The procedure of *li'ān* is obligatory when the husband cannot produce four witness in support of his accusation and the wife denies the accusation. The husband and wife, to be eligible for this procedure, must be sane, major, Muslim, possessing the power of speech, validly married to each other, and those who have not been convicted for *qadhf.* These atributes must continue throughout the procedure. Pardon, extinction of the accusation and *ṣulḥ* are not acceptable in this procedure. No agents can be appointed for the procedure of *li'ān* and the husband and wife have to make the statements themselves.

The procdure of *li'ān*, whatever its outcome, gives rise to the obligation of separating the husband and wife. This is done by the *qāḍī*, who will pronounce an irrevocable (*bā'in*) divorce. The husband and wife can remarry after this, but some jurists in the school maintain that such separation gives rise to a perpetual prohibition like the prohibition of women who are perpetually prohibited for a man.

When the accusation by the husband is accompanied by the denial of paternity of a child, and the procedure of *li'ān* has been completed, the paternity of the child with respect to the accusing husband stands terminated. Denial of paternity has essential conditions attached to it as follows:—

(*a*) Paternity is the right of the child. Thus, it cannot be denied when the woman is pregnant as such denial does not work against the foetus. Paternity must be denied when the child is born.

(*b*) Paternity must be denied within a few days of the birth of the child, which is seven days according to one narration from Abū Ḥanīfah. According to the two disciples, the maximum period of denial is the postnatal period of the woman. In the case of a person who was not present when the wife gave birth to a child, he has to deny paternity within a similar number of days from the time the information was communicated to him.

(*c*) Paternity of the child will be attributed to the father if it is not denied within the period above. As it is established through a valid marriage, paternity can only be denied through the procedure of *li'ān*.

(*d*) The *qāḍī* must pronounce the denial of paternity at the time of pronouncing divorce in such a case. Denial of paternity is not valid without the pronouncement of the *qāḍī*.

Denial of paternity has legal effects with respect to inheritance and bequest.

CHAPTER 8

ḤUKM (LEGAL EFFECTS) OF *ṬALĀQ*

8.1 Primary and secondary legal effects of divorce

The legal effects of a divorce prior to consummation of marriage are that even if one repudiation is pronounced, it amounts to an irrevocable (*bā'in*) divorce. The entitlement to dower is discussed above. There is no waiting period in such a case.

The legal effects of divorce after consummation of marriage vary according to whether the divorce is revocable (*raj'ī*) or irrevocable (*bā'in*). It also varies according to the number of repudiations pronounced.

All the forms of divorce have certain primary effects and secondary effects. The primary effects are linked to the way ownership of conjugal rights has been affected. These include the right to retract the repudiation (*rujū'*) or remarriage with the divorced wife in relation to the number of repudiations pronounced.

The main secondary effect of all types of divorce is the obligation to undergo the waiting period (*'iddah*). This has certain related requirements like mourning (*iḥdād*) and not moving out of the house, but these requirements may not apply to all women undergoing the waiting period.

8.2 Legal Effects of Revocable (Raj'ī) Divorce

8.2.1 Legal effects of *raj'ī* divorce

Raj'ī divorce is revocable, which grants the husband the right to retract and take back his wife within the waiting period. This recourse to the wife is called *rujū'*.

The primary legal effect of a revocable divorce is the loss of the number required to give finality to divorce. Loss of ownership of physical access to the wife and prohibition of sexual intercourse are not part of the legal effects. The *aḥsan* form results in a *raj'ī* divorce. The *ḥasan* form too is a *raj'ī* divorce till such time that the third repudiation is pronounced in the third period of purity.

If the husband does not take back his wife, within the waiting period, the divorce becomes irrevocable (*bā'in*) with its accompanying legal effects. Till such time that the divorce becomes irrevocable at the end of the waiting period, the husband continues to possess the right of *īlā'*, *ẓihār* and *li'ān*. He is under an obligation to provide maintenance and residence as the woman is still his wife. The wife is under an obligation to abide by the requirements of the waiting period in accordance with the provisions that apply to her case.

The husband has the exclusive right of *rujū'* (retraction of divorce) and *rujū'* does not depend upon the consent of the wife. This requirement has been overturned by the Muslim Family Laws Ordinance, 1961, in which *rujū'* depends upon the consent of the wife supported by her relative as provided by the reconciliation procedure.

8.2.2 The nature of *rujū'* (retraction of divorce) and its requirements.

Rujū' implies the continuation of the ownership of physical access, the prevention of its extinction and the cancellation of the cause that can lead to such extinction.

8.2.2.1 *Rujū'* WITH WORDS

Rujū' is undertaken by words or by conduct. Statements like "I have retracted the divorce," "I have taken you back," "I have made her return" or any other words that convey the meaning of the retraction of divorce pronounced earlier amount to *rujū'*. It is not required that witnesses be taken for this form of retraction, but jurists consider this to be recommended and better in order to avoid subsequent disputes.

8.2.2.2 *Rujū'* BY CONDUCT

Rujū' by conduct occurs when the husband has intercourse with his wife or even physical contact with desire that falls short of actual sexual intercourse. As retraction depends upon the will of the husband and not the wife, it will not be *rujū'* if the wife has physical contact with the husband. It is recommended that the wife seek adornment (assuming that she is staying in her husband's house) so as to make the husband incline torwards her.

8.2.2.3 THE CONDITIONS OF *RUJŪ'* (RETRACTION OF DIVORCE)

Among the conditions of *rujū'* (retraction) is the continuation of the waiting period. If the husband does not take back his wife, within the waiting period, the divorce becomes irrevocable (*bā'in*) and the husband and wife can only come together through remarriage. A conditional retraction, one associated with the future or one that stipulates an option is not valid.

The husband does not possess the right of *rujū'* after a divorce that is irrevocable (*bā'in*) or separation resulting from *khul'*, *īlā'*, *li'ān*, and also when the right of divorce has been granted to the wife through different kinds of statements.

The husband does not possess the right of *rujū'* when there has been proper seclusion, but he claims that he did not have intercourse with his wife. The same applies when the woman was menstruating at the time of seclusion, was in a state of *iḥarām*, was in a state of fasting due to Ramaḍān, or was suffering from a defect that prevents sexual intercourse. If the husband was suffering from a defect—like impotence, castration, mutilation of the organ—at the time of seclusion, he does not possess the right of *rujū'*.

8.3 Legal Effects of Irrevocable (Bā'in) Divorces

8.3.1 The legal effects of less than three irrevocable divorces

Bā'in (irrevocable) divorce is of two types: three divorces (see next section); and less than three divorces (two or one) qualified as irrevocable.

The primary legal effect for one divorce qualified as irrevocable, or two divorces qualified as irrevocable, is the loss of number required to give finality to divorce as well as the loss of ownership of physical access. Accordingly, it is no longer permissible for the husband to undertake *rujū'* or have sexual intercourse with his wife. Further, the husband can no longer pronounce *īlā'* or *ẓihār* nor can *li'ān* take place between the spouses. If one of them dies, they cannot inherit from each other.

The prohibition arising from such a divorce is not enhanced and does not prohibit the woman perpetually for the husband. He can, therefore, remarry the woman within the waiting period or after it without an intervening marriage that is required in the case of enhanced prohihibition.

8.3.2 The legal effects of three repudiations pronounced at once or in three periods of purity

Three divorces result from the *ḥasan* form of divorce when three repudiations are pronounced in three consecutive periods of purity and also from the deviant (*bid'ah*) form of divorce in which the three repudiations are pronounced at once. The *ḥasan* form remains a revocable (*raj'ī*) form till such time that the third repudiation is pronounced, after which it becomes irrevocable (*bā'in*).

The primary legal effect of three divorces pronounced at once, or three pronounced in three periods of purity, is the completion of the number three that not only prohibits *rujū'* and sexual intercourse with the divorced wife, but also results in enhanced prohibition that makes the woman unlawful for the man like the women of the prohibited category.

The only way the husband can remarry such a divorced wife is after her valid marriage to another man which must be consummated through sexual intercourse. The contract of the intervening marriage must not stipulate expressly that the husband will divorce the woman even if the inner intention of the husband is to divorce the woman. If a stipulation of divorce is made in such an intervening marriage contract, the resulting contract becomes irregular (*fāsid*) and cannot make the woman lawful for the first husband. Once the second husband divorces the woman, she becomes eligible for the first husband after the waiting period.

8.4 When is Remarriage with Divorced Wife Permissible?

Where the number of repudiations used is less than three, as in the *aḥsan* form on completion of waiting period, or even where repudiations less than three are qualified as irrevocable, the resulting irrevocability is minor (*baynūnah ṣughra*).

Where the three repudiations are complete, whether they were qualified as revocable or irrevocable, the resulting irrevocability is enhanced or major (*baynūnah kubrā*).

In case of minor irrevocability, the husband can remarry his divorced wife without an intervening marriage. Thus:–

(*a*) He can remarry his divorced wife, during the waiting period or after it, if he divorced her through a single irrevocable repudiation or through two irrevocable repudiations.

(*b*) He can remarry his wife divorced through the *aḥsan* form of divorce after the divorce has become irrevocable (*bā'in*) on termination of the waiting period. Within the waiting period, the husband can exercise *rujū'* and there is no need of remarriage.

(*c*) He can remarry his wife who was divorced prior to consummation of marriage.

In case of major irrevocability, the husband cannot remarry his divorced wife without an intervening marriage. Thus, he can remarry his divorced wife, who was divorced through the *ḥasan* form, in which three repudiations were completed in three separate periods, or was divorced through the deviant form in which three repudiations were pronounced at once, after she has married another man through a valid marriage contract, consummated the marriage with him, and is divorced by him.

8.5 Waiting Period ('Iddah) and its Legal Effects

8.5.1 The meaning and types of *'iddah* (waiting period)

The word *'iddah* in its literal sense means "number." In its technical sense, it means the "period" stipulated for the termination of the remaining effects of the contract of marriage. According to al-Shāfi'ī, it means the "act" of waiting. Waiting period applies to a woman whose marriage has been consummated.

There are three types of waiting period: (a) *'iddah* of menstrual periods, (b) *'iddah* of months, and (c) *'iddah* of pregnancy.

8.5.2 The waiting period (*'iddah*) of menstrual periods

The purpose of the waiting period *'iddah* of menstrual periods is the "vacation of the womb." It is imposed as the right of the husband and as the right of Allah.

The *'iddah* of menstrual periods has two causes:

(*a*) **Separation after valid contract:** The first is separation after a valid contract of marriage irrespective of the separation being caused by divorce or without divorce. The condition stipulated for this type of waiting period is that there be actual consummation or proper seclusion (*khalwah ṣaḥīḥah*). Thus, the waiting period does not become obligatory without consummation and proper seclusion. Proper seclusion has been considered a sign of actual sexual intercourse for making the waiting period obligatory on account of the right of Allah. Improper seclusion (*khalwah fāsidah*) does not serve this purpose.

(*b*) **Separation after an irregular contract:** Separation after an irregular contract effected by a pronouncement of the *qāḍī* or by mutual separation. The condition for this type of separation is actual sexual intercourse. Seclusion (*khalwah*) is not stipulated as a condition in this of type waiting period.

(*c*) **Intercourse of *shubhah*:** This type of *'iddah* arises from intercourse as a result of *shubhah*. For example, where a woman who is not the person's wife is brought to the man's chamber at the time of his marriage (due to mistake or intentionally). Many of the contracts that are treated as *fāsid* on account of *shubhah* will also fall under this category.

The waiting period of menstrual periods is terminated at the end of the third period.

(*a*) This applies whether the separation has occurred after a valid contract, a consummated irregular (*fāsid*) contract or sexual intercourse through the semblance (*shubhah*) of a contract.

(*b*) The waiting period terminates at the end of the third menstrual period, after separation, upon the performance of major ablution.

(*c*) The waiting period for a woman with irregular menstrual bleeding is also three menstrual periods.

If a woman claims that her three periods are over and that the waiting period has terminated, she will only be deemed truthful if a minimum period of 60 days (39 days according to Abū Yūsuf and Muḥammad) has passed after the commencement of the waiting period. The minimum period after which the woman will be deemed truthful is calculated by the jurists in different ways. If the woman remarries when this minimum period has passed, and then claims that her waiting period had not terminated, her statement will not be admissible. Where the woman was divorced during her postnatal period, the jurists add another 15 days to this minimum period.

8.5.3 The waiting period (*'iddah*) of months

The waiting period (*'iddah*) of months is of two types. The first is the waiting period that acts as a substitute for menses. The second type is due to death.

8.5.3.1 WAITING PERIOD (*'IDDAH*) OF MONTHS THAT IS A SUBSTITUTE FOR MENSES

The *'iddah* that is imposed as a substitute for menstrual periods is the waiting period of a wife who is a minor, one undergoing menopause and the woman who does not mensturate at all without being a minor or aged. The cause for the obligation of this period is divorce, which is also the cause for the waiting period of menstrual periods, but in this case it is imposed as right of the contract of marriage. The conditions for this type of waiting period are: (a) Minority, old age, and not menstruating at all without being a minor or old. (b) Intercourse or what amounts to it through proper seclusion.

8.5.3.2 WAITING PERIOD (*'IDDAH*) OF MONTHS FOLLOWING DEATH OF HUSBAND

The second type is the waiting period that is a category in itself and the cause is the death of the husband. The purpose of this waiting period is to give expression to "grief" on account of the loss of the blessing of *nikāḥ*. The condition for the obligation of this type of period is the death of the husband after a valid contract of *nikāḥ* alone, irrespective of there being consummation (through sexual intercourse) and irrespective of whether the woman is one who menstruates.

8.5.3.3 DURATION OF THE WAITING PERIOD (*'IDDAH*) OF MONTHS

The duration of the waiting period imposed as a substitute for menstrual period is three months, irrespective of the separation resulting due to divorce or without divorce after a valid contract, a consummated irregular (*fāsid*) contract or sexual intercourse through the semblance (*shubhah*) of a contract.

The duration of the waiting period resulting from the death of the husband is four months and ten days. The duration is to be reckoned in lunar months where the month is either of 29 days or 30 days. If the separation occurs at the beginning of the the month the lunar months are to be followed. If the separation occurs after part of the month has passed, the period is to be recknoned in days by way of precaution. The number of days for three months will be 90 days and for four months and ten days it will be 130 days.

8.5.4 The waiting period (*'iddah*) of pregnancy

The waiting period (*'iddah*) of pregnancy is imposed after death of husband or separation. The conditions for this type of waiting period are that the pregnancy should arise:

(*a*) From a valid contract of *nikāḥ*.

(*b*) From an irregular (*fāsid*) contract of *nikāḥ*.

(c) It does not arise from pregnancy as a result of *zinā*. Thus, a woman who is pregnant as a result of *zinā* can marry prior to the delivery of the child. Abū Ḥanīfah stipulates in this case that the husband should not have intercourse with her till after she has delivered the child.

The waiting period extends till the delivery of the child whether this occurs in a few days after death of husband or of separation from him, or months. If the woman has delivered the child, she can remarry even if the husband is still on the bier.

The waiting period is also terminated if the woman has a miscarriage, but mere blood clots are not sufficient to invoke this rule. When the woman gives birth to more than one child, the period is terminated upon the delivery of the last child.

8.5.5 The conversion of one type of waiting period into another

Where a minor who does not menstruate is divorced, or a woman who assumed she was undergoing menopause is divorced, and then such a woman starts mentruating, she has to renew her waiting period on the basis of menstrual periods, because a substitutory duty cannot replace the original duty when the performance of the original is possible.

Where a woman undergoing the waiting period on the basis of menstrual periods enters menopause, she is to renew her waiting period on the basis of months, provided she is past the usual age of menopause, which according to some reports is the age of 50 years.

8.5.6 Among the legal effects of the waiting period is that a stranger cannot propose to the woman nor can he marry her during her waiting period

The woman divorced cannot marry another person during her waiting period (*'iddah*) as the legal effects of the prior contract are still operative.

A stranger is not permitted to propose to a woman while she is still in her waiting period. Nor is such a person to pay compliments to the woman that indicate the intention to marry her. There is some leniency, with respect to compliments, in the case of a woman who is undergoing her waiting period after death of her husband.

8.5.7 A legal effect of the waiting period for some of the divorced women is the prohibition of moving out of the house

8.5.7.1 GENERAL MEANING

A woman who is sane, a major and a Muslim, if she is undergoing the waiting period (*'iddah*) arising from a valid contract of marriage, is not to go out of the house of her husband, when she is not in a state of compulsion, either by day or by night, irrespective of the divorce being a triple-divorce, irrevocable divorce or revocable divorce. The husband is under a duty not to turn the divorced wife out of the house. The same rule applies to a woman who is undergoing *'iddah* after *khul'* in which she negotiated away her maintenance, because she did this by choice. The waiting period is the right of Allah and cannot be nullified.

8.5.7.2 WOMAN DIVORCED THROUGH A REVOCABLE DIVORCE

A woman undergoing her waiting period after a revocable divorce is not permitted to travel, with the husband or with a *maḥram*, irrespective of the purpose of the travel being the obligation of *ḥajj* or another purpose.

8.5.7.3 WOMAN WHOSE HUSBAND HAS DIED

As for the woman whose husband has died, she is not to go out at night, but there is no harm if she goes out during the day in order to acquire her daily necessities, because her maintenance is no longer the duty of the husband as he is dead, and she has to acquire her maintenance. She is not permitted to move away from the house to another residence.

(*a*) The house of the husband for this prupose is the residence provided by the husband where the woman was resident at the time of her divorce even if the husband did not live there all the time.

(*b*) Compulsion and necessity arise where the woman feels threatened that the house will collapse, her person and goods are not secure, she does not have privacy as other heirs (including other wives) are resident there too, or that the premises were rented and she does not have enough to pay the rent.

8.5.7.4 THE RESTRICTION DOES NOT APPLY TO SOME

'Iddah (waiting period) is the right of Allah, and is an act of worship, therefore, the rule of staying in the house does not apply to the following:—

(*a*) A minor wife who is divorced through a divorce that is irrevocable. She can move out of the house at her discretion whether or not her husband permits her to do so. Waiting period is a right of Allah, but such rights are not claimed from minors. If the divorce was revocable she can go out of the house with the permission of the husband as his right is also involved.

(*b*) If the woman is a Kitābiyyah, she can go out of the house as the unbelievers are not addressees of the laws that are acts of worship. She is not to go out of the house if her husband prevents her from doing so. If such a woman converts to Islam during her waiting period, she is to follow the rules applicable to Muslim women.

8.5.8 The requirement of mourning during the waiting period

Mourning means the avoidance of adornment, which means the use of perfume, the wearing of fancy clothes, the use of facial make-up (including kohl and dyeing of hair). Mourning during the waiting period is a physical act of worship.

It is prescribed for a woman who is a major, sane and Muslim irrespective of her being one whose husband has died, who has been divorced thrice or has been divorced through an irrevocable divorce. It is not prescribed for a minor, insane, a Kitābiyyah, or a woman who is undergoing *'iddah* after an irregular contract. It is not prescribed for a woman who has been divorced through a revocable divorce. In fact, it is recommended for such a woman to seek adornment so as to facilitate *rujū'* by the husband.

8.5.9 Entitlement to residence and maintenance for some women undergoing the waiting period

If the woman is divorced after a valid contract of marriage, then—

(*a*) If the divorce is revocable the woman is entitled to residence and maintenance without disagreement.

(*b*) If the divorce was pronounced thrice at once or was an irrevocable divorce, she is entitled by *ijmā'* to residence and maintenance if she is pregnant, and according to the jurists if she is not pregnant.

If the woman is undergoing the waiting period after an irregular contract, she is not entitled to residence or maintenance just as she was not entitled to residence and maintenance during the continuity of the irregular contract.

If the woman is undergoing the waiting period after separation other than divorce following a valid contract, she is entitled to residence and maintenance when the separation is initiated by the husband. When the separation is initiated by her, and the basis is not a vile act on her part, or like seeking separation from an impotent person, she is still entitled to residence and maintenance.

When the woman is undergoing the waiting period after the death of the husband to whom she was married through a valid contract, her residence and maintenance cannot be imposed on the heirs of the husband. The same applies to a woman who was married through an irregular contract and the husband died.

8.6 Paternity, legitimacy and acknowledgement

Adoption is not permitted under the *sharīʿah.* No person can acknowledge a person who is not his actual or presumed legitimate child to be his child.

An illegitimate child is attributed to the mother from whom he can lawfully inherit and who is under a duty to provide maintenance for the child. (See below inheritance of such a child for the complete understanding of the issue).

8.6.0.1 RIGHTS OF CHILD ON ACKNOWLEDGEMENT

Where a child is proved, or presumed, to be the legitimate child of a husband and wife who were married to each other through a valid contract, an irregular contract, a contract of *shubhah*, or whose marriage was presumed through acknowledgement by the man, the child will—

(*a*) be entitled to inherit from both parents;

(*b*) be entitled to maintenance as prescribed; and

(*c*) will be subject to the rules of custody and *wilāyah* as applicable to the child.

8.6.0.2 DETERMINING PATERNITY

The jurists acknowledged that determining the paternity of a child was not a matter of *ijtihād* and *ra'y*, therefore, they could only rely on the transmitted sources. The following rules were laid down on the basis of the sources to determine the legitimacy of the child:

(*a*) The minimum period of gestation is six months.

(*b*) The maximum period of gestation is two years. This was presumed on the basis of a tradition. The Shāfiʿī jurists consider the maximum gestation period to be four years. Apparently, this was done to give protection to the child who could not be adopted under Islamic law. It is obvious that such a rule will apply to the woman who has not claimed the termination of her *'iddah* on the basis of periods, although bleeding may sometimes be visible during pregnancy as well. The Shi'ah school is reported to consider the period of gestation to be ten months.

8.6.0.3 DENIAL OF PATERNITY

A child may be presumed to be legitimate by applying the rules for the minimum and maximum gestation periods laid down by the jurists, but due to case law developed in the Sub-continent such a presumption may be treated as rebuttable where the husband wishes to deny the paternity of the child through *li'ān* or another situation provided that the gestation period exceeds 280 days or is less than six months in relation to the actual or alleged marriage. It is suggested that in such cases, the paternity of the child may be determined on the basis of DNA tests.

8.6.0.4 ACKNOWLEDGING THE CHILD

A person may acknowledge a child to be his legitimate child. This may be done when he is also acknowledging that he was married to the mother through either a valid marriage, an irregular marriage or a marriage resulting in a semblance of the contract (*shubhah*) of marriage. All other cases of marriage will be treated as void and the resulting offspring illegitimate. No man can acknowledge an illegitimate child to be his own, and the child will be attributed to the mother with the accompanying legal effects.

8.7 *Right to inherit and the waiting period*

If the waiting period (*'iddah*) is a result of a revocable (*raj'ī*) divorce and one of the spouses dies during the waiting period, the other will inherit from the spouse who died. This rule applies whether the divorce was pronounced during illness or health. The rules of inheritance will apply as they would have prior to divorce.

If the divorce was an irrevocable divorce or a divorce pronounced thrice at once, during the health of the husband, and one of them dies during the waiting period, the other spouse cannot inherit from the one who died.

If the divorce was an irrevocable divorce or a divorce pronounced thrice at once, but the husband was ill, the wife cannot inherit from the husband upon his death during the waiting period, by consensus, if the divorce was pronounced with the consent of the wife. If the divorce was not pronounced during such illness with the consent of the wife, she is entitled to inheritance upon the death of the husband during the waiting period.

Illness of the husband for purposes of this section means terminal illness, also called death illness (*maraḍ al-mawt*).

Part III

WET-NURSING, ADOPTION, FOSTERAGE, MAINTENANCE, CUSTODY AND SUITS

CHAPTER 9

WET-NURSING AND MILK-SIBLINGS

9.1 *Wet-nursing (raḍā') and rules for milk-siblings*

The general rule in *fiqh* is that all those women who are prohibited for a man on account of consanguinity are also prohibited on account of wet-nursing by the same woman. The woman herself becomes prohibited for the male child she has breastfed, as she is legally treated as his mother from the perspective of marriage, but not for other things like inheritance and maintenance.

The daughters and mother of the nurse are prohibited for the male child she has breastfed. The daughters of the daughters of the nurse how low soever are prohibited for him and so also the daughers of the sons of the nurse how low soever. The position is the same for the female child she has breastfed where the females in the case of the male child are to be replaced by males who become prohibited for the female child.

If the nurse feeds two unrelated children they become brothers, and if one of them is a female marriage is not possible between the two children. The rule is that all those who gather at one breast become brothers and sisters as the case may be. The daughters of the brothers of the nurse or the daughters of her sisters are not prohibited for the male child, because they have become his cousins.

9.2 *Rules for the husband of the wet-nurse and relationship with milk-siblings*

The general rule for the husband of the wet-nurse, according to most jurists, is that he becomes the father of the child. A female child breastfed by his wife, therefore, becomes prohibited for the husband of the nurse.

The sons of the husband, whether from the nurse or from another woman, are also prohibited for a female child breastfed by his wife. Likewise, the sons of his sons and the sons of his daughters.

On this logic, if a man has two wives with both bearing him children, and they separately breastfeed two unrelated children, they all become brothers through the father. If one of these two children is a female, marriage is not lawful between these two children. If both are female, they cannot be married to a man at the same time. The children also become prohibited for the brothers and sisters of the husband, but not for the children of such brothers and sisters.

9.3 Suckling that gives rise to prohibitions

The prohibitions arise when a child under the age of weaning is suckled by a woman. There is no condition of less or more, but milk must pass to the child from the woman's breast.

The condition for prohibitions arising due to suckling are not met if there is no milk in the breasts or when a child beyond the age of weaning is breastfed.

9.4 Proof of suckling and legal effects

Where two persons, who are about to be married to each other, believe that they are brother and sister, they should not go ahead with the marriage contract.

Where a man acknowledges that a woman he has married is his sister due to wet-nursing, he is to be deemed truthful as he is acknowledging a fact that goes against him. The husband and wife are to be separated.

If the separation occurs prior to consummation of marriage, the woman is entitled to one-half dower if she deems the husband untruthful. If the separation occurs after consummation of marriage, the woman is entitled to full dower as well as residence and maintenance during the waiting period.

The relationship arising from *raḍā'* may also be proved through the testimony of two males or one male and two females. Where two male witness, whose *'adālah* has been established testify to their being brother and sister, there is no dower for the woman if the separation is effected prior to consummation as the contract between the two was irregular, because they were not aware of being brother and sister. If the testimony was given after consummation of marriage the woman is entitled to the lesser of the named and reasonable dower, but she is not entitled to residence and maintenance.

If a single woman testifies that a husband and wife are brother and sister through *raḍā'*, it is not legally binding for the couple to separate, but some jurists consider it recommended that they should separate if there are no grounds for impeaching the testimony of the woman.

CHAPTER 10

ADOPTION (TABANNĪ), THE FOUNDLING, FOSTERAGE AND ORPHANAGES

10.1 *Adoption is not permitted under the sharīʻah*

Adoption is not permitted on the basis of the verse, "And He has not made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths. Call them by their fathers: that is juster in the sight of Allah. But if ye know not their father's names, (then they are) your brothers in faith, or your friends." (33:4, 5)

If a couple, or a single person, bring up a child, who is not their own child or the child of either spouse, as their own, they cannot give the child their name, nor can the child inherit from them.

The rules of wet-nursing (*raḍāʻ*) will not apply to such a child for purposes of marriage, unless the woman adopting him breastfeeds the child as provided in the rules of *raḍaʻ*.

10.2 *The abandoned child (laqīṭ) or foundling*

The term *laqīṭ* means a foundling, that is, an abandoned child who is found by someone. The child may have been abandoned by its family due to poverty, the apprehension of the accusation of *zinā*, or another reason. It may also apply to a child who has been abducted and escapes his captors or is abandoned by them.

The immediate taking of the child into protective custody is deemed an act of piety of the highest order as it amounts the saving of life, which is required by the *sharīʻah*. The finder will, as soon as possible, bring the matter to the notice of the sultan or the court for the completion of the necessary formalities.

The child is treated as a free person and is assigned all the rules of free persons, except that one accusing the child's mother of *zinā* is not to be awarded the *ḥadd* of *qadhf*.

An abandoned child is treated as Muslim, unless it is found abandoned in a Church or a Synagogue in which case the child will be assigned the religion of the finder.

10.3 Fosterage of the abandoned child (laqīṭ)

The *imām* (state) will take the best interests of the child into consideration while finding a home for the fosterage of the child.

The finder of the child, who took it into protective custody, will be given the highest priority in allocating a home to the child, because the finder has undertaken an act of piety recommended by the *sharī'ah* for the saving of life.

The *walī* of the child is always the sultan. The child can alter this through the contract of *muwālāt* with the finder or another person, on attaining puberty. The child is not permitted to enter into such a contract if the sultan has paid *diyah* on his behalf by acting as his *'āqilah*.

Maintenance and all the expenses of the child, until he attains majority, are the responsibility of the treasury (*bayt al-māl*). Any property found on the child or with him belongs to the child. The finder is under no obligation to bear the expenses of the child and any expenses he may have incurred, with the permission of the court, are to be reimbursed by the treasury. He is not entitled to reimbursement if the court had not granted permission. The finder or the foster parent cannot recover the amount spent without permission from the child either when the child attains majority.

10.4 Claiming paternity of the abandoned child

If at any stage, paternity of the child is claimed by someone, the court will require evidence and follow the prescribed procedure for confirming such paternity.

10.5 Orphans and orphanages

The rules of the foundling are applicable to all orphans who have been abandoned by those responsible for them, unless the system of *wilāyah* is enforced by the state.

CHAPTER 11

MAINTENANCE OF WIFE, CHILDREN AND RELATIVES

11.1 Categories of maintenance

The causes of maintenance are three: marriage, *nasab* (kinship) and ownership. Accordingly, maintenance has four categories: (1) maintenance of wife; (2) maintenance of close relatives (*aqārib*); (3) maintenance of slaves; and (4) maintenance of animals and property. The third category does not exist today.

11.2 Maintenance of Wife During Marriage

11.2.1 Maintenance of a wife is obligatory, but lack of continued maintenance is not a basis for seeking divorce

Maintenance of a wife who is not living away from the husband of her own accord is obligatory upon the husband.

The husband's continued ability to maintain his wife is not sufficient cause for seeking divorce. For the position taken by state law on the issue, see discussion above.

11.2.2 Meaning of maintenance and amount to be paid to wife

Maintenance includes residence (*suknā*), clothing and daily expenses for the wife and for a servant (salary and funds for running the mistresses' household).

There is no fixed amount (although jurists have suggested amounts according to their own times), and the amount will depend upon the financial status of the husband and the needs of the woman according to what is customary and reasonable.

If the husband is well off and enjoying financial ease, he is to pay an amount for daily expenses, clothing, household expenses and the expenses of a servant to an extent that is reasonable for such households. If the husband is a person of ordinary means, he is required to pay an amount that is reasonable for such households to cover expenses and clothing, but he is not required to maintain a servant for his wife.

Clothing has to be provided to her for different seasons on a regular basis, even if she refuses to use some of the clothing provided. The wife is entitled to maintenance of a certain month even if she has saved part or all of the amounts of the previous months.

11.2.3 Wife is entitled to maintenance as long as she lives with her husband

A wife is entitled to maintenance as long as she continues to live with her husband. If she stays away from the husband, of her own accord, and against the wishes of the husband, she is not entitled to maintenance during the time she stays away provided that her husband has paid her dower or the dower is deferred.

If the husband does not keep the wife with him, when she is willing to do so, she is entitled to maintenance.[57]

The wife staying with the husband is entitled to her maintenance even if she is ill and cannot perform her marital duties. The wife staying with the husband is entitled to her maintenance even if she denies physical access to her for purposes of intercourse.

11.2.4 Fixing of expenses by the court and recovery of past expenses

A wife is not entitled to recover past unpaid expenses unless the court had fixed the amount to be paid prior to the withholding of expenses by the husband.

The court may fix the expenses to be paid to the wife in case of dispute (as in a suit for the restitution of conjugal rights). The court will keep the position of the husband in view while fixing the amount.

If the husband discontinues the payment of expenses after they had been fixed by court, his wife can raise a loan to meet her expenses and recover the amount later from her husband. The expenses determined by the court become a debt liability that is to be paid by the husband for which he may be imprisoned by the judge until he pays.

Where a wife enters into an agreement with her husband to accept maintenance that is less than what is sufficient for her, she may later go back on the agreement and demand what is sufficient for her, because entitlement to maintence is renewed with time.

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[57] In *Muhammad Tauqeer.v. Additional District Judge*, 2001 MLD 1650, it was held that the mere refusal by the wife to live with her in-laws in the absence of her husband was no ground to disentitle her from maintenance. The wife, in the circumstances, could not be considered to be disobedient as she was under no obligation to live with her in-laws.

Where a man has more than one wife, the court is to fix equal amounts for them irrespective of one wife being of a different religion. Where the husband claims that he is poor and the wife claims that he is not, the statement of the husband is to be accepted. The burden of proving that he is not poor will be on the wife. Liability for a debt established by the decree of the judge is terminated when it is either paid off, is waived by the woman, or when one of the spouses dies.

11.2.5 There is no maintenance in an irregular contract of marriage, whether the contract is an ordinary irregular contract or one arising out of *shubhah*

There is no maintenance after an irregular contract irrespective of the irregularity being based on the usual circumstance of *fasād* or on *shubhah*.

As there is no contract, the woman is prevented from performing marital duties, which becomes a hurdle in the way of maintenance.

11.3 Maintenance of Wife During Waiting Period (*'Iddah*)

11.3.1 Maintenance for divorced women during waiting period (*'iddah*)

Every woman who is divorced after a valid contract of marriage, whether through three repudiations or a single repudiation, is entitled to residence and maintenance as long as she is in the waiting period. The following divorced women are entitled to residence and maintenance during their waiting periods:—

(*a*) A woman divorced thrice through three repudiations pronounced at once.

(*b*) A woman divorced through a single repudiation, whether revocable or irrevocable. The woman divorced through a revocable repudiation is still the man's wife in all respects.

(*c*) A divorced woman who is pregnant, and her waiting period extends up to the delivery of the child.

(*d*) A woman undergoing *'iddah* after *khul'*. If she surrendered her right to maintenance, she is still entitled to residence, which is a requirement that cannot be bargained away. She may, however, voluntarily agree to remain in her own house or bear the burden of residence herself.

(*e*) A woman undergoing *'iddah* as a result of *īlā'*.

(*f*) A woman undergoing *'iddah* as a result of *li'ān*.

(*g*) A woman undergoing *'iddah* as a result of *riddah* (apostasy) of her husband.

11.3.2 Maintenance not claimed during waiting period lapses

If the husband is not paying maintenance expenses during the waiting period the woman must claim them while still in her waiting period.

Maintenance expenses not claimed, till after the waiting period is over, cannot be recovered later and are deemed to have lapsed, except in cases where such expenses have been fixed by the court at the time of divorce.

11.3.3 Right to maintenance remains even if waiting period is prolonged

Where the waiting period is prolonged as a result of lengthening menstrual periods, the right to residence and maintenance continues.

Where a disagreement arises about the termination of the waiting period, it is the statement of the woman along with her oath that is to be given precedence, unless the husband can lead evidence about her acknowledgement of such termination.

11.3.4 There is no right of maintenance during waiting period for a woman whose husband has died

There is no maintenance during the waiting period of a woman whose husband has died. A claim for maintenance does not lie against the heirs.

She is entitled to residence and is permitted to go out of the house during the day to meet her needs.

11.3.5 Effect of lewdness or apostasy on the part of the woman during her waiting period

If a woman commits an act of lewdness (sufficient for an accustation of *zinā*), she is still entitled to her maintenance, unlike during the continuance of marriage where it is to be stopped.

Where a woman commits apostasy her maintenance comes to an end, not because of her act, but because she is imprisoned. If she repents and returns to the house, her maintenance is restored.

11.3.6 Maintenance after exercise of option of puberty where marriage was consummated

Where marriage of a minor was consummated, but she exercises the option of puberty, she is entitled to maintenance as long as she is in her waiting period.

11.3.7 Where the husband acknowledges after consummation of marriage that his wife was prohibited for him

Where a man acknowledges after consummation of marriage that his wife was actually prohibited for him, the woman will be entitled to residence and maintenance during the waiting period.

11.3.8 Maintenance in waiting period resulting from an irregular contract

There is no maintenance during the waiting period that follows an irregular contract.

11.4 *Should There be Maintenance for the Divorced Wife After the Waiting Period ('Iddah)?*

In recent times, a debate has ensued whether a divorced wife should be paid maintenace, under Islamic law, even after her *'iddat*. The famous *Shah Bano* case in India fuelled this debate. The Supreme Court in India decided that payment should be made, but on resistance from Muslims the Congress passed a law that diluted this judgement. It is well known that "alimony" is paid under US law and in other countries in the West, although payment can also be made to the husband under such laws. Islamic law does not acknowledge such payment.

11.4.1 Why should payment be made to the wife?

Islamic law maintains that after divorce there is no relationship between the husband and wife, either physical or otherwise, therefore, there is no legal basis for justifying such payment. This isssue should not be confused with the maintenance of children, because Islamic law does impose a duty on the husband for children. The issue should not be confused with the division of household assets either for which provision is also made in Islamic law.

There are different theories in the West for justifying the payment of alimony. The first theory is the compensation theory, which considers payment to the wife as justified for having been tied-up in the bond of marriage for some period. This theory lacks a moral basis as it reduces the sacredness of the marriage contract into one of the employer-employee relationship in which a pension is justified after retirement or parting of ways. This theory reduces the contract of marriage into a commercial contract that is akin to prostitution.

The rehabilitation theory believes that the woman needs some time to adjust in society, and till such time that she does the husband must contribute to her financial security. Islamic law imposes the duty of providing maintenance and residence to the divorced wife during her waiting period, and in the case of the death of the husband she receives a share from the husband's estate.

11.4.2 There is no compelling legal basis for maintenance after the waiting period

Whatever is said for the justification of alimony in the West is not sufficient for providing a legal or moral basis for such payments; there is no legal basis fo the payment of alimony. The *Shah Bano* case was about an aged woman (62) who was divorced and left destitute; it had emotional undertones. The sympathy for the woman is justified, but there is no sympathy for a system that does not apply the provisions of Islamic law in toto, where there is the provision of *zakāt*, the sytem of *wilāyah* that imposes a duty on relatives for providing maintenance (see below) and finally that places a duty on the *bayt al-māl* to provide funds.

11.5 Each wife entitled to maintenance is entitled to residence

Every wife who is entitled to maintenance is entitled to residence essential to meet the purposes of the marriage contract.

If the husband keeps the wife with his relatives—like his mother, sister and others—in a manner that violates the privacy of the woman necessary for purposes of marriage thus hindering physical access of the husband to the wife, the wife has a right to complain to the court and the court will compel the husband to provide proper residence for her.[58] If the wife is provided a private room in a house when other relatives are also resident in the house, but her privacy is not violated, the wife does not have a right to claim separate residence.

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[58] In *Muhammad Siddique v. Shahida Parveen*, 1991 CLC 227, the High Court observed that it is not necessary for the wife to live with her in-laws in case her husband was serving abroad and she was entitled to maintenance and would only be disentitled to maintenance when she failed to live with her husband.

Where a wife is provided independent residence with no one else residing with her and she complains to the court that her husband beats her or physically torments her, the court is to make enquiries from the neighbours about the veracity of the statement. If the court thinks that the complaint is probably true, it is to order the husband to treat her decently, and if he persists the court may discipline the husband with means considered appropriate. Thus, wife-battering may become an offence.

If the husband has provided residence to the wife in a neighbourhood with people of bad repute, the court on complaint by the wife can compel the husband to move the wife to a better neighbourhood.

11.6 *Maintenance of Relatives*

11.6.1 Maintenance of a child is primarily the duty of the father

The father is responsible for the maintenance and residence of the child in accordance with what is customarily good. The father is also responsible for the breastfeeding expenses of the child where the mother is not breasfeeding the child.[59]

The maintenance of the child is obligatory till the age of majority of the child and even after that where the child is economically or physically handicapped or chronically ill. In the case of a female child, maintenance is obligatory even after the age of majority (puberty).[60]

Where the father is unable to maintain his child and the mother has the means to do so, she is to spend on the child but is given the right to recover from the father when he enjoys financial ease. If the husband is prevented from earning due to a handicap, she cannot recover from him.

11.6.2 The mother of the child cannot be compelled to breastfeed the infant

Where the mother of the child refuses to breastfeed the child, the father is to make alternative arrangements for breastfeeding till the age of weaning of the child. Nevertheless, the *fatwā* is that she should feed the child to prevent injury to it.

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[59] In *Abdul Rauf v. Shireen Hassan*, PLD 2001 SC 31, the Supreme Court held that parents are under an obligation to provide maintenance and it is a moral obligation of the parents to provide the means to support the life of their children. In a number of cases, the courts have also held that regardless of the mother's income or poverty and the father's preferential right to custody, the father is obliged to maintain his minor children and daughters till they get married.

[60] In *Arbab Mir Muhammad v. Irum Altamas*, PLJ 2005 SC 742, the Supreme Court observed that the father who was a well to do person was under an obligation to provide maintenance to the son, although the son had become an adult and was still getting an education.

Where the mother breastfeeds the child, while she is still married to the child's father, she is not entitled to additional expenses for breastfeeding besides her normal expenses of maintenance, clothing and residence.

If the mother, who has been divorced, continues to breastfeed the child in her custody, she is to be paid expenses for such breastfeeding. This does not apply to the case of the revocable (*raj'ī*) divorce. In all these cases, and even after the waiting period, the husband retains the right to hire another woman for wet-nursing.

11.6.3 Maintenance of relatives within the prohibited degree of marriage is obligatory

It is obligatory upon a person to maintain and support his relatives, who fall within the prohibited degree for marriage, when they are in need. This duty grants an enforceable right to the relatives and they can approach the court for their maintenance, residence and clothing expenses.

The duty relates to the provision of expenses, residence and clothing as needed. The duty for expenses and clothing remains even if such relatives own a house and employ a servant; they are not to be compelled to sell their house. Past claims not recovered do not become a debt in this case.

The following relatives can acquire this right:—

(*a*) *Parents and grandparents.*—The children are duty bound to support their parents. If there is one child the entire burden falls upon that child. If there are more than one, the burden is distributed among the sons, and if one is not able to pay the others will pay on their behalf and will have recourse to him when he enjoys financial ease. Where there are no sons, or the sons are unable to support the parents, the duty falls upon the daughter or daughters as the case may be. The same rules apply to paternal grandparents and maternal grandparents when they do no not have male children or their children to support them.

(*b*) *Brothers and sisters; nephews and nieces.*—It is the duty of a person to support his or her brothers and sisters if they are in need. The duty moves on to the nephews and nieces if there is no one else to support them.

(e) *Uncles and aunts whether maternal or paternal.*—It is the duty of a person to support his or her uncles and aunts, whether maternal or paternal, when they are in need and do not have their own children or their children cannot support them due to financial hardship.

The general rule is that the duty first falls upon persons closer for purposes of inheritance. If they cannot pay due to financial hardship, the duty devolves upon those next in line but they can recover from those prior if and when they regain financial ease.

11.7 There is no duty to provide maintenance for relatives who are not within the prohibited degree of marriage

There is no duty on a person to provide maintenance for a person who is not within the prohibited degree of marriage. This rule will include first cousins, whether paternal or maternal, and those more remote.

11.8 Maintenance of Animals and Property

11.8.1 Maintenance of domestic pets and animals

A person is required to provide for the maintenance of his pets and other domesticated animals. According to Abū Yūsuf, the owner can be compelled by the court to provide such maintenance.

11.8.2 It is recommended that property be maintained to avoid loss

A person cannot be compelled to maintain his property like houses and real estate. It is considered *makrūh* (disapproved) not to maintain such property when there is chance of a loss.

CHAPTER 12

CUSTODY OF CHILDREN (*ḤIḌĀNAH*)

12.1 The meaning of ḥiḍānah (custody)—Hizanat in Urdu

The term *ḥiḍānah* means placing a thing on the side or clasping a thing on the side. In the first sense it implies separating the child from the father and placing it to one side, while in the second meaning it implies the holding of the child on one side like a mother carries a child in one arm on the side. In the legal sense it means custody of the child for purposes of protecting, feeding, bathing, clothing, and in general bringing up the child.

The meaning does not include breastfeeding the child as the mother is not to be compelled to do so, and the father has to make alternate arrangements in case the mother refuses to breastfeed the child. Nevertheless, the *fatwā* is that she should feed the child to prevent injury to it. She is, therefore, to be compelled if no one can be found for wet-nursing the child.

The custody of children belongs to women at certain stages of the child's life, and it belongs to men at other stages of the child's development, depending upon the welfare of the child. Welfare of the child is the governing standard on the basis of which custody can be taken away from one parent or person and given to another.[61]

12.2 Custody of children (ḥiḍānah)

The primary right of custody of children belongs to the mother. In the case of females, other than the mother, is a condition that custody cannot be awarded to females who are not within the prohibited degree of marriage. Thus, it cannot be granted to paternal or maternal cousins of the child.

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[61] In *Firdous Iqbal v. Shifaat Ali*, 2001 SCMR 838, the Supreme Court set aside the order of the High Court whereby the High Court had set aside orders of the two courts below by holding "Right of the father to hold custody of his minor son was not an absolute right, but qualified by the paramount consideration for the welfare of the minor. The father may disentitle himself to custody on account of his conduct and in the light of facts and circumstances of each case."

The priority for the custody of children awarded to related females is as follows: mother, mother's mother, father's mother, child's real sister (from the same parents), child's sister through mother (from another husband), child's sister through father (from another wife), maternal aunt,[62] paternal aunt.

The custody of children, in the absence of the father, is awarded to the residuaries (*'aṣabāt*) in order of inheritance for the male child. In the case of the female child such a person must be within the prohibited degree of marriage and must also be a reliable person who is not a *fāsiq*, otherwise the *qāḍi* is to award custody to one of the reliable female relatives. An additional condition, in the case of both children, is that the residuaries be Muslims, that is, have the same faith as the children.

Where the mother marries a man, who is not related to the child and is a complete stranger for the child, custody is to be taken away from the mother. Where the mother becomes an apostate custody is to be taken away from her.[63]

When the mother loses the right to custody, the right passes to the father, because the females mentioned in the priority above derive their right through the mother.

12.3 Duration of custody (ḥiḍānah) granted to mother

According to most jurists, the male child is to remain in the custody of the mother till he becomes independent of the female, that is, when he can eat and drink independently and can dress up independently. Some jurists say that he is to remain with the female till he can perform ablution (*wuḍū'*) independently, that is, he can perform *istinjā'* independently. According, to al-Khaṣṣāf, he is to stay with her till the age of seven, which is generally the age when the male child can perform the above tasks.

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[62] In *Nighat Firdous v. Khadim Hussain*, 1998 SCMR 1593, the lower courts had granted custody of the minor to the father on the grounds that the father has an absolute right to claim custody of a child over seven years of age, and that maternal aunt has no such right. The Supreme Court observed that the maternal aunt had taken care of the child when he was fifteen days old at the time of the death of the minor's mother. Throughout this period the father had not taken any interest in the minor but after the maternal aunt filed an application for maintenance of the minor child, the father filed a custody petition.

[63] The courts have mostly presumed that the welfare of the minor lies in giving custody to the mother, subject to supervision and control of the father. The grounds for disqualification of right of mother to custody are not strictly followed if the same are not affecting the welfare of the minor. In *Muhammad Tahir v. Raees Fatima*, 2003 SCMR 1344, the Supreme Court disallowed the father's petition for custody of the minor children and disagreed with his contention that he was allowed to take custody from the mother because the mother was illiterate, had no source of income and that she had developed an illicit relationship with another person. The court held that a mother who had not contracted marriage after divorce was a fit person to hold custody.

In the case of the female child, the mother exercises custody till the child starts menstruating. When custody is exercised by females other than the mother or one of the grandmothers, the rule for the female child is the same as that for the male child, and both are to be delivered to the father for custody when they reach the age of seven.[64]

The rule of analogy requires that the male child too should stay with the mother till the age of puberty, however, this analogy has been given up in favour of *istiḥsān*, which in turn is based upon the consensus of the Companions (God be pleased with them).

12.4 Duration of custody (ḥiḍānah) granted to father

The custody granted to father, and to other males, in the absence of the father, begins with the age of seven for the male child and extends up to his puberty. In the case of the female child, when custody was being exercised by the mother or a grandmother, the custody of the father begins at the age of puberty (but the girl is really a major at this age and acquires independence for many things). When custody was being exercised by a female other than the mother or one of the two grandmothers, the father acquires custody of the female child in the same manner as he acquires that of the male child, and in both these cases the custody extends up to the age of puberty.

Although custody, technically, terminates at the age of puberty, it depends upon whether the child is trustworthy for being granted independence. This applies to the male child as well the female child when they are sane. When the children are trustworthy, it is they who exercise the choice of where they will stay.

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[64] In *Khalida Parveen v. Muhammad Sultan Mehmood*, PLD 2004 SC 1, the Supreme Court set aside the orders of the High Court whereby it had disallowed the petition of the mother under section 491 Cr.PC. for recovery of her minor daughter aged 2 years on the ground that the minor was too attached to her father. The court held that the custody of the two-year old daughter by the father was illegal and improper and that the mother was entitled to custody.

12.5 Location for exercising custody

As long as the parents of the child are married to each other, the place of custody is where the parents reside. If the husband wishes to take the child with him to another town, he cannot do so as long as the child is of the age in which custody belongs to the mother. If the mother wishes to leave town, with or without the child, while the custody of the child is with her, the husband has the right to prevent her from doing so. Likewise, if the woman is undergoing her waiting period, she is not entitled to move out of the place of custody with or without the child, nor does the husband have the right to expel her from the house.

When the waiting period is over and the woman wishes to move with the child to another town which was her original town, she may do so if that is the town in which her marriage took place and she wishes to return to it. In case of any other town, she cannot do so unless the father of the child permits it. Nevertheless, the father cannot forcibly take away the child from the mother.[65]

A woman cannot move the child in her custody to the *dār al-ḥarb* even if she was married to the father of the child there, because doing so is considered harmful for the child. She may do so if both parents belong to the *dār al-ḥarb*.

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[65] In *Shaista Naz v. Muhamamd Naeem Ahmad*, 2004 SCMR 990, the Supreme Court held that the High Court has the power to issue directions in the nature of *habeas corpus* under section 491 Cr.P.C if the child is illegally or improperly removed. The High Court had granted custody to the father on the ground that the mother, on contracting second marriage, had lost the right to Hizanat, and was no more entitled to custody of the minor, but the Supreme Court set aside the order of the Court, holding that even on remarriage the mother was entitled to retain custody and the custody would not, *ipso facto*, devolve on the father. The High Court should have been directed to approach the Guardians Court.

CHAPTER 13

SUITS AND GROUNDS FOR DISSOLUTION OF MARRIAGE

3.1 *System of courts to implement personal law in an Islamic state like Pakistan—West Pakistan Family Courts Act, 1964*

The detailed system of courts for implementing personal law and other parts of the law according to the Islamic legal system will be discussed in the Book of *Da'wā* (procedure).

Family matters are adjudicated under the West Pakistan Family Court's Act, 1964. Rules made under the Act are called the West Pakistan Family Courts Rules, 1965. The Act requires at least one family court in each district, and at least one woman judge in each district. The purpose of the Act was "to make provision for the establishment of Family Courts for the expeditious settlement and disposal of disputes relating to marriage and family matters and for matters connected therewith." Accordingly, the courts have jurisdictions over the following matters:

1. Dissolution of marriage including khula.
2. Dower.
3. Maintenance.
4. Restitution of conjugal rights.
5. Custody of children, and the visitation rights of parents to meet them.
6. Guardianship.
7. Jactitation of marriage.
8. Dowry.
9. Personal property and belongings of a wife.

The courts also have jurisdiction to try offences related to the above matters; namely, cases falling under SS337A(i) (shajjah khafifah), 337F(i) (damiyah), 341 (wrongful restraint), 342 (wrongful confinement), 343 (wrongful confinement for more than three days), 344 (for more than ten days), 345 (when writ exists), 346 (wrongful confinement in secret), 352 (criminal force other than on grave provocation) and 509 (insulting modesty of woman with gestures) of the Pakistan Penal Code.

13.2 Suits for dissolution of marriage under Dissolution of Muslim Marriages Act, 1939

§2 of the Dissolution of the Muslim Marriages Act, 1939 provides that the marriage for a woman may be dissolved on the following grounds:—

(*i*) Where the whereabouts of the husband have not been known for a period of four years, that is, the case of the *mafqūd* (missing person) discussed above.

(*ii*) Failure of the husband, or neglect, to provide maintenance to the wife for a period of two years. This is in contravention of the traditional Ḥanafī law, which does not permit dissolution on these grounds (see details above).

(*iii*) Where the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961. This ground is not recognized in Islamic law.

(*iv*) Where husband has been sentenced to imprisonment for a period of seven years or upwards. This ground is not recognized in Ḥanafī law.

(*v*) Where husband has failed to perform, without reasonable cause, his marital obligations for a period of three years. It is not clear what marital obligations means here.

(*vi*) Where the husband was impotent at the time of the marriage and continues to be so.

(*vii*) Where the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease. There is no ruling in traditional law on this count, but it may be justified on the basis of endangering the life and health of the wife.

(*viii*) Where a minor, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years. It is to be noted that this provision is in violation of traditional Ḥanafī law, because this option is only available when marriage was concluded other than by father or grandfather. See section on the exercise of the option of puberty above.

(*ix*) Where the husband treats her with cruelty. The section describes different forms in which cruelty may manifest itself. According to traditional Islamic law, the initial remedy is that the court should discipline the husband even if it means sending him to prison. Nevertheless, some of the forms of cruelty may appear sound:

(*a*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment;

(*b*) associates with women of evil repute or leads an infamous life;

(*c*) attempts to force her to lead an immoral life;

(*d*) disposes of her property or prevents her exercising her legal rights over it;

(*e*) obstructs her in the observance of her religious profession or practice; or

(*f*) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.

(*x*) Any other ground which is recognized as valid for the dissolution of marriages under Muslim Law.

13.3 *Jactitation of Marriage*

A suit for jactitation of marriage is filed in cases where one person claims that he or she is married to another person and the other person denies such marriage. The court will declare whether a marriage does or does not exist. This type of suit is recognized in traditional Islamic law.

13.4 Other suits and complaints that are possible

There are important matters that are not covered by statutes nor are suits filed by parites. For example, maintenance of wife by husband is recognized by both statutes and courts, but the maintenance of other relatives is not. It is suggested that lawyers should file suits on behalf of their clients pursuing maintenance claims, like a poor father or mother seeking maintenance from his rich son who fails to provide him funds for subsistence. If suits can be filed for tort claims on the basis of English common law, there is no reason why they cannot be filed on the basis of the Islamic "common" law, that is, traditional Islamic law. The courts, on the other hand, must start entertaining such claims. This is just like the provision above where dissolution of marriage can be sought on "any other ground which is recognized as valid for the dissolution of marriages under Muslim Law."

Part IV

THE BOOK OF WAQF (CHARITABLE TRUST)

CHAPTER 14

THE MEANING AND NATURE OF WAQF

14.1 *Literal and technical meaning of waqf*

The term *waqf* means restraint and prevention. The verse, "*But restrain them* (*waqifūhum*), *for they must be asked*,"[66] is used in the same meaning. The word *ḥabs* is sometimes used as a synonym for *waqf* and also conveys the meaning of arresting and restraining. In its technical sense it means "restraining or preventing a once owned property from passing on into the ownership of another." The restraining of the property is usually supposed to serve some religious or charitable purpose, and the benefits are passed on to the beneficiaries. The main objective of the creation of a *waqf* is to seek the pleasure of Allah and to secure nearness to Him.

There has been a disagreement between the the Imām on the one side and the two disciples on the other about the legal meaning of *waqf*. According to al-Sarakhsī, it was on account of this disagreement that Imām Muḥammad did not devote sufficient time to the detailed issues of *waqf*, and these were developed by his disciples like Khaṣṣāf and Hilāl.

14.2 *Abū Ḥanīfah's view on waqf*

According to the Imām, the term *waqf* does not create a perpetual restraining of property and the owner of the property or the heirs cannot be alienated from the property forever. A *waqf* can be created for various purposes, but the restraining of the property does not become binding, that is, the owner has a right to sell the property or give it away by way of gift, and when he dies it becomes part of the inheritance of the heirs. This type of restraining of property is similar to the lending of property through *'āriyyah* (commodate loan). The property reverts back to the owner, within his lifetime, after the purpose is fulfilled. If he specifies that it will continue in the restrained state even after his lifetime, it amounts to a bequest (*waṣiyah*), operating up to a third of the property, which will continue till the lifetime of the beneficiaries and then the property will revert to the heirs. A *waqf* created during terminal illness is assigned the same rule as a bequest.

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[66] Qur'ān 37:24.

The basis for the Imām's opinion is that a perpetuity works against the interest of the heirs and is designed to prevent the *farā'iḍ* (shares of the heirs) in the property from taking effect. This circumvention of the laws of inheritance cannot be permitted, except as prescribed by the *Sunnah* in the case of a bequest up to a third.

The Imām does agree that ownership in property can be passed on in perpetuity to Allah Almighty, as in the case of a mosque. The primary example for such dedication in the *sharī'ah* is the Ka'bah, which was dedicated to Allah by Abraham Khalīl Allah (pbuh). The Imām makes two observations about this type of dedication:

(*a*) Such a dedication or consecration is not called *waqf*.

(*b*) This type of dedication cannot be used for imparting private benefits, and is used mostly for acts of worship or for meeting religious duties.

The rule against perpetuities in English common law appears to follow, more or less, the Imām's view.

14.3 The view of the Ṣāhibayn on waqf

Imām Abū Yūsuf initially held the same view as Imām Abū Ḥanīfah, but when he went for *ḥajj* and saw the cases where properties had been dedicated by the Companions (God be pleased with them) by way of *waqf*, he changed his view. There are traditions that describe the *awqāf* created by the Companions (God be pleased with them).

The cases and traditions referred to above became a basis for criticism levelled against the Imām A'zam for not following the traditions, but in reality it is a case of interpretation and the Imām in fact preferred a powerful principle of protecting the integrity of the law of inheritance. The main argument against the assertion of this principle is that there is no circumvention of the law of inheritance as the *sharī'ah* grants freedom to an individual to dispose of his property in any way he likes: gift, charity or otherwise. When he creates a *waqf*, he is actually disposing of this property according to the essential freedom that he possesses. The rights of the heirs are activated at the time of his death and are linked to the property he owns at that time.

The Ṣāḥibayn consider *waqf* to be of two main types: (i) *waqf* in which ownership passes to Allah Almighty as in the case of a mosque; and (ii) *waqf* in which the ownership of the owner is eliminated and the property is restrained or arrested, that is, it is taken out of all ownership and is dedicated in perpetuity for the objectives specified by the owner. In both cases, the rule is that "the property can neither be inherited, donated by way of gift, or sold" (*lā yūhab, wa-lā yūrath, wa-la yubā'*). The rule is based upon the words of the Prophet (pbuh).

14.4 The types of waqf according to the Ḥanafī jurists

There are three types of *waqf* in the Ḥanafī school of law:

(*a*) *Perpetual Waqf for Mosques:* The dedication of property for mosques and other religious purposes in which property passes to Allah Almighty. This is upheld unanimously by the three jurists of the Ḥanafī school.

(*b*) *Perpetual Waqf for Charitable Purposes:* This type of *waqf* is approved by Imāms Abū Yūsuf and Muḥammad; it is not permitted by Abū Ḥanīfah.

(*c*) *Temporary Waqf for Charitable or Other Purposes:* This type of *waqf* is permitted by Abū Ḥanīfah, but the school does not follow this as in reality it amounts to an ordinary perpetuity in which the property reverts to the owner or his heirs. He does not call the second type *waqf*, while the Ṣaḥibayn do not call this type *waqf*.

The rules of *waqf* that follow in this part are based mostly upon the views of the Ṣaḥibayn, except in the case of mosques where the views of all three Imāms coincide about permisibility. Additional details are based upon the derivations therefrom by Khaṣṣāf and Hilāl (God bless them all). It is these rules that are followed by the school.

The rules of *waqf* developed in British India have mixed up rulings for the types of *waqf* other than mosques. The rules must be separated clearly and the law should be rectified by the courts. In this part the first two types will be discussed. The third type will be discussed only to show where the rules have been mixed up.

14.5 The wisdom underlying the institution of waqf and the destruction of awqāf in the modern times

The Companions (God be pleased with them) created the institution of *waqf* through their inspired wisdom, and the Ummah followed suit. For more than one thousand years prime property in each Muslim country was dedicated to the service of Muslims, providing them with a foundation for mosques, *madāris*, graveyards, hospitals and many other facilities. These institutions were an essential feature of the Islamic culture.

In the last one century or more the value of such property rose and some of it came to be located in the heart of big cities. Arguments were advanced, especially at the beginning of the 20th Century, about the inefficient use to which such prime property was being put and that it could be turned into other type of assets and funds for yielding greater revenue.

The rule stated above that *waqf* property could neither be inherited, donated by way of gift, or sold also meant that no loans could be raised against such property and it could not be mortgaged. This rule stood like a rock against the banking interests that wanted to submerge this property under debt just as they were doing with every other type of property in the hands of Muslims. Even when all real estate in every Muslim country came under debt of some kind, *waqf* property stood protected from the debt touting vultures.

Banks ultimately succeeded in having the *awqāf* abolished, first in Turkey and then in many other Muslim countries. Even the so-called Islamic banks have joined the chorus against this noble and protective institution, and are talking about funds as *waqf*.

In the Sub-Continent, the people have resisted the abolition of *awqāf*, but the British first ruined their management, and today land-grabbers have been let loose on the property of the *awqāf*.

CHAPTER 15

CONDITIONS FOR ESTABLISHING A WAQF

15.1 *Conditions for the person establishing the waqf, that is, the wāqif*

The conditions are as follows:—

(*i*) **Legal Capacity:** The *wāqif* (واقف) must be sane and a major. A *waqf* cannot be established by a minor or an insane person as it is an act that results in a loss and the minor and the insane person do no have a legal capacity for incurring loss. The *walī* is also not authorised to establish a *waqf* on their behalf for the same reason.

(*ii*) **Wāqif must be the owner:** The *wāqif* must be the owner of the property having the full right of disposal over it.

(*iii*) **Waqf not trade:** The *wāqif* must be a free person. A slave authorised by a master to undertake business for him cannot create a *waqf*, because the *waqf* is not a matter of business. On the same analogy a corporation and the modern state cannot create a *waqf*, because the creation of *waqf* is meant to secure nearness to Allah, and such nearness in the case of these persons cannot be conceived.

(*iv*) **Declaration of perpetuity and delivery of property:** The *wāqif* must make a declaration of perpetuity, determine the value of the property, undo his own possession and deliver the property to whom it has to be delivered. Delivery is not a condition according to Abū Yūsuf, because the *wāqif* may keep the management initially in his own control. In the case of a mosque, delivery is completed when a group prays on the property after *adhān* and *iqāmah*, because mosques are created for offering congregational prayers. According to Qudūrī's narration, prayer by a single person on the property amounts to delivery of possession. This is Abū Ḥanīfah's view based on the reasoning that mosques are places for prostrations (*sujūd*) and even if one person does so delivery is complete.

(*v*) **The *wāqif* should not become a beneficiary:** The *wāqif* must not become a beneficiary himself, according to Muḥammad. This is not a condition according to Abū Yūsuf. In the case of a mosque, it is obvious that he can pray on the property. If he is the first *mutawallī* himself, he is permitted to spend on himself.

(*vi*) **Improvements in waqf property:** According to Abū Yūsuf, if the *wāqif* stipulates for himself the sale of the *waqf* property in order to replace it with better property, the stipulation is valid. In his view, it falls in the category of selling a damaged door of a mosque or selling the dead trees that are part of the *waqf*. The manager (*mutawallī*) must do so with the permission of the court.

(*vii*) **Objective of the waqf:** The *wāqif* must declare an objective that can be met perpetually from the property. According to Abū Yūsuf, stating the objective in these terms is not necessary. If he fails to do so and meeting the objective is no longer possible, the poor will become the beneficiaries, as they are deemed to be present in the intention formed by the *wāqif*.

15.2 *The form (ṣīghah) used for creating a waqf must not be void for vagueness*

The form used for creating the *waqf* must not be *mubham* (vague). It should state that it is an act of charity dedicated for the general religious benefit, like a mosque, or charity perpetually dedicated to the benefit of the poor, whose revenue will be distributed among the poor or the benefit of the property will be utilised by the poor. If determined beneficiaries are intended, the form should indicate who such beneficiaries are and that if they are not to be found the revenue or benefit will pass on to the poor. It is not necessary that the poor be a specified number.

Using words like *waqf*, *ḥabs*, *ṣadaqah* and the like without specific intent or details, as mentioned above, will be treated as void for vagueness. Statements like "My house is *waqf* for you," "I have restrained (*ḥabs*) this land of mine," "I have restrained this property for paying off my debts," "This property is *ṣadaqah* or *waqf* for so and so," have all been deemed void for vagueness.

15.3 *It is recommended that the wāqif record the creation of the waqf in a deed*

A *waqf* can be created verbally, but it is recommended that the *wāqif* record it in a deed (*ṣakk*; pl. *sukūk*). The deed should, besides identifying the beneficiaries, lay down the details of the appointment of the *mutawallī* and important rules of management.

5.4 Conditions for the act of creating a waqf

The *wāqif* must intend and declare the *waqf* to be perpetual. A temporary alienation of property is not valid for a *waqf*. Abū Ḥanīfah's concept of *waqf* will accept temporary alienation, but this view is not followed by the school.

The *wāqif* must intend that he is relinquishing ownership and that it is not passing to anyone else. This type of alienation is comparable to the emancipation of a slave; he becomes free and is no longer subject to ownership. In the case of a mosque, he must intend that ownership is passing to Allah Almighty. This is based upon the verse of the Qur'ān, "And the mosques (*masājid*) are for Allah (alone)."[67]

In the type of temporary *waqf* approved by Abū Ḥanīfah, the alienation is comparable to *'āriyyah* or a thing lent to another for temporary use. The ownership always remains that of the *wāqif* and reverts to the owner after a period. It is for this reason that the Ṣāhibayn do not call this *waqf*.

It follows that a *waqf* cannot be a a legal person. If it is treated a legal person, the property will pass from the *wāqif* to the legal person and this violates the primary condition that the *waqf* must not be owned by anyone. In the case of a mosque, an additional condition is that the *waqf* is a religious institution and legal persons cannot be assigned religious duties. Further, a legal person cannot act as an intermediary between Allah and His servants.

In case of a temporary *waqf* approved by Abū Ḥanīfah (God bless him), the property may pass to a legal person on the condition of reverting to the owner or his heirs after a prescribed period.

15.5 Conditions for the waqf property or the mawqūf

The property of the *waqf* must be immoveable property. A *waqf* of moveable property is not permitted. The reason is that moveable property negates the concept of perpetuity. Moveables permanently affixed to the immoveable property or those that are essential for its functioning become part of the *waqf*. It is to be noted that Imām Abū Ḥanīfah's view does not uphold perpetuity, for which reason the school does not follow his view. Any view of Imām Abū Ḥanīfah about property being immoveable must, therefore, be related to the question whether ownership is being passed on to Allah.

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[67] Qur'ān 72:18

The exclusion of moveables means that they cannot be part of *waqf* property as the primary object. Certain moveables are allowed on the basis of *istiṣān* by the school. These are like arms and rides for *jihād*, utensils used for bathing the deceased, and the *muṣḥaf*. This is similar to the *waqf* of a stream, road or passageway permitted as part of land or other real estate. Abū Yūsuf says that such moveables can only be permitted on the basis of customary practice, especially practice during the time of the Prophet (pbuh). Imām Muḥammad does not impose this condition and maintains that they can be permitted on the basis of customary practice or otherwise. According to analogy, trees cannot constitute a valid *waqf*, but the jurists permit it on the basis of *istiḥsān* due to the need of the poor attached to it.

Waqf of books is not permitted according to Abū Ḥanīfah as they are moveables. This view can only be meaningful if the ownership is passed on to Allah Almighty. Narrations from the two disciples differ. Today, copyright is not perpetual, but it is not clear whether *waqf* can be used to grant perpetuity to copyright, that is, if copyright is deemed Islamic.

Waqf must be property that is partitioned or can be easily partitioned. Accordingly, *waqf* of a *mushā‘* is not permitted. According to Abū Yūsuf *waqf* can be created for a *mushā‘* as well, because delivery is an essential condition to complete the *waqf* and that is not possible unless the property is separately identified and taken into possession.

It may be inferred that funds or cash are not valid property for *waqf*, because they negate the concept of perpetuity. First, cash is moveable. Second, cash decreases and increases in value and stands consumed when it is used, that is, ownership necessarily passes to the other party when cash is employed for generating revenue. A new type of *waqf* based on Imām Abū Ḥanīfah's ideas may be created where perpetuity is not an essential feature and ownership is not suspended or passed on to Allah Almighty. Such funds, however, are already in existence. The banks are more interested in immoveable property under *waqf* administration.

CHAPTER 16

ADDITIONAL RULES AND LEGAL EFFECTS OF WAQF

16.1 *If the wāqif creates the waqf through a bequest or during terminal illness, it will be valid if the property is equal to or less than one-third of his estate*

Waqf is essentially a donation, therefore, it is valid up to the extent of the entire property of the *wāqif* if made in health during his lifetime. If it is made by way of bequest, the rule of one-third will operate, unless the heirs agree to condone the amount over and above one-third. This rule for bequest applies if the *waqf* is created during terminal illness (*maraḍ al-mawt*).

16.2 *If the wāqif stipulates an option for himself the waqf is void*

If the *wāqif* stipulates an option for himself (*khiyār al-sharṭ*), like saying "I have established the *waqf*, but I need to think about it for three days," the *waqf* is void.

16.3 *If the waqf is made contingent upon the happening of an event, the waqf is void*

If the *waqf* is made contingent upon the happening of an event, the *waqf* is void.

16.4 *The wāqif may stipulate that he will be the beneficiary and after his death his descendants*

A *wāqif* may stipulate that he will be the beneficiary during his lifetime, and after his death his dscendants will be beneficiaries. He may make his descendants the beneficiaries without naming himself. The beneficiaries will be paid equal shares and not on the basis of two shares for the male and one for the female. This is called *waqf 'alā al-awlād* or *waqf* for children.

16.5 A waqf may be established jointly by two persons

Two persons who jointly own undivided (*mushā'*) property may establish a *waqf* and deliver the property to a single Mutawallī.

The two persons may specify different objects and beneficiaries and the revenue according to the share of each will be spent on the several purposes.

16.6 Legal effects of waqf

The legal effects upon the creation of a *waqf* are as follows:—

(*i*) **Ownership in property dedicated to mosques and purely religious objectives passes to Allah Almighty:** Property in mosques passes to Allah Almighty. This may also be the case for places like graveyards, shrines and other such places.

(*ii*) **Ownership in property dedicated for charitable purposes becomes suspended and is no longer subject to transfer:** Ownership in property dedicated for general charitable purposes like *madaris*, *khanqāhs*, *sirā'is*, trees, land meant to feed the poor and needy does not pass to Allah Almighty, rather it becomes free from ownership and transfer. It is like a slave being set free by the master so that the free person is not owned by anyone nor can he be owned or sold or inherited.

(*iii*) **The creation of *waqf* does not give rise to a juristic person nor is a *waqf* a juristic person:** A *waqf* is not a juristic person. The conclusion drawn by courts in British India that it is, is based upon inadequate understanding of the principles of Islamic law.

(*iv*) ***Waqf* once created is binding in the sense that it can no longer be revoked:** *Waqf* once created can no longer be revoked. It becomes *lāzim*. This is a major difference between Abū Ḥanīfah and his disciples. Abū Ḥanīfah considered *waqf* other than mosques to be *ghayr lāzim*, that is, terminable or revocable. It is also for this reason that the form of *waqf* advocated by him is not considered *waqf* by the school.

(v) **Control of the property passes to the *mutawallī* as directed by the *wāqif*, but not the ownership:** The control and management of the *waqf* property passes to the *mutawallī* appointed by the *wāqif*. This does not mean the passing of ownership in the meaning of disposal of the property. For the detailed rules about the *mutawallī*, see below.

(vi) **The right of beneficiaries becomes linked to the *waqf* property either to use the property or receive its revenue:** In the case of a mosque, the Muslims acquire the right to pray in it. As the mosque belongs to Allah, and not to the Ḥanafīs or others, the use of the mosque is determined by Allah. In the case of property dedicated for charitable purposes, the right of the beneficiaries becomes linked to the revenue of the property and it is a right that is justiciable. It is the duty of the *mutawallī* to secure the rights of the beneficiaries. If the beneficiaries specified by the *wāqif* cease to exist, the right passes to the poor in general.

(vii) **If the objective of the *waqf* fails, it will be applied to compatible objectives as far as possible:** Abū Yūsuf does not permit the passage of property back into the ownership of the owner or his heirs. Muḥammad permits it in extreme cases where the objective has failed completely, as in the case of property given for a mosque where people have stopped praying. For example, land given for a mosque that has been turned into a dunghill. Abū Yūsuf's view of implementing the objectives of the *waqf* as far as possible is similar to what is called the doctrine of cy-pres, in Western law, which means "as near as may be."

CHAPTER 17

THE MUTAWALLĪ AND RELATED MATTERS

17.1 The wāqif has the right to appoint a mutawallī (manager) and a waṣī (executor)

The *waqf* needs a manager who is called a *mutawallī* (manager), also referred to as *wālī* and *qayyim*. The *wāqif* may also appoint a *waṣī* (executor) who is authorised to appoint a new *mutawallī* if the previous *mutawallī* dies, relinquishes his charge, or is removed by the court. The *wāqif* also has the right to lay down the procedure for the appointment of a new *mutawallī* when the need arises or he may name the future *mutawallīs* and the method of succession.

In case there is no provision for appointing a new *mutawallī*, or the right to be a *mutawallī* becomes disputed, the appointment will be made by the court. It is recommended for the court that a suitable person from the family of the *wāqif* may first be considered for appointment, failing which the court may appoint any suitable person as the *mutawallī*.

17.2 The wāqif may appoint himself as the first mutawallī

The *wāqif* has the right to appoint himself as the first *mutawallī*. He may appoint another *mutawallī* prior to his death, and such a *mutawallī* may or may not be his relative.

17.3 The mutawallī is to set aside, from the revenue received, amounts that are due on account of administration of the waqf or on account of ʻushr

The *mutawallī* will first set aside the *ʻushr* that is due, in case the property is agricultural land. He will then set aside his own expenses for running the *waqf*, salaries for his essential staff, and any amounts that are required for the upkeep and maintenance of the property.

The *mutawallī* does not need authorisation from the *wāqif* or any other person for appropriating these expenses. The *wāqif*, however, may reserve for himself, in the deed of formation, the right to render advice (or inspect the accounts) while he is alive. This authority may be passed on to his executor (*waṣī*) after his death.

17.4 *Once the essential expenses have been set aside, the mutawallī is to distribute the remaining in accordance with the objectives of the waqf and directions of the wāqif*

The *mutawallī*, after appropriation of essential expenses, is to distribute the remaining revenue of the *waqf* among the beneficiaries in accordance with the objectives of the *waqf* and as directed by the *wāqif* at the time of the formation of the *waqf*.

In the absence of any directions to the contrary, the beneficiaries are to be treated as equals by the *mutawallī*.

17.5 *The mutawallī is liable for claims pertaining to the activity of the waqf, and no claim can be made against the property of the waqf*

The *mutawallī* does not own the property of the *waqf*, but all claims arising from the activity of the *waqf* are to be directed against the *mutawallī*. The property of the *waqf* cannot be attached to satisfy a claim.

Amounts paid by the *mutawallī* are to be recovered from the revenue of the *waqf* if any. The office of the *mutawallī* is not a corporation and cannot be attached in satisfaction of a claim.

Neither the creditors nor the beneficiaries can claim anything from the property of the *waqf*. The court cannot permit the sale, transfer or mortgage of the *waqf* property under any circumstances. It can only permit the sale of those parts of the property that need improvement and that can be improved through replacement.

17.6 *In Pakistan, a number of laws, made by the state, also apply to the awqāf and their administration*

The following laws apply to the *awqāf* in Pakistan:—

1. The Mussalman Wakf Validating Act, 1913
2. The Mussalman Wakf Validating Act, 1923

3. Punjab Waqf Properties Ordinance, 1979 (IV of 1979)
4. Balochistan Waqf Properties Ordinance, 1979 (IV of 1979)
5. Sindh Waqf Properties Ordinance, 1979 (IX of 1979)
6. [68][Khyber Pakhtunkhwa] Province Waqf Properties Ordinance, 1979 (I of 1979)

These laws alter the traditional rules applicable to the *awqāf*, as follows:—

1. The laws provide for the registration of property.
2. Provide for the eviction of persons in possession of the property.
3. The laws permit the taking over of *waqf* property by notification.
4. The laws provide for the sale of *waqf* property in the interest of the public and for the preservation of the objectives of the property.

The suits relate mostly to these matters and of the right to be a *mutawallī*.

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[68] Subs. by The Khyber Pakhtunkhwa Laws (Amendment) Act, 2011 (Khyber Pakhtunkhwa Act No.IV of 2011)

Part V

THE BOOK OF *HIBAH* (GIFT)

CHAPTER 18

THE MEANING, NATURE AND ESSENTIAL ELEMENT OF GIFT (HIBAH)

18.1 *The literal and technical meaning of hibah (gift)*

The literal meaning of *hibah* is "gift," "donation" and "grant." The *wāhib* is called the donor and the *mawhūb lahū* is the donee, while the *mawhūb* is the donated property.

In its legal sense, *hibah* is a unilateral contract that requires an offer from the donor to transfer the entire corpus of his marketable property, that is present, immediately to the donee, and it requires performance from the donee in the form of taking possession.

18.2 *The essential element (rukn) of gift*

The essential element of gift is an offer from the donor and performance from the donee. The elements are thus two: (a) an offer from the donor and (b) the act of possession by the donee. There is no need of a formal acceptance by the donee. If the donee remains silent in the session of the contract, and takes over possession, the gift is valid. Acceptance of the gift is required when the donee is already in possession of the property, as in the case of a bailee to whom a gift is made by the owner.

As this is a unilateral contract, there is a disagreement among jurists whether the term *hibah* (gift) applies to offer alone or to both offer and performance in the form of possession. It is different from the contract of sale, a bilateral contract, in which the essential element (*rukn*) applies to both offer and acceptance. The disagreement is illustrated by the case where a person makes a vow that he will make a gift to someone, but then does not. He breaks his vow if the word *hibah* applies to the offer alone, but does not break it if the term includes acceptance through possession on the part of the donee.

18.3 The distinction between gift and concepts related to gift

The following concepts need to be distinguished from gift.

1. *Ṣadaqah* (charity): This is exactly like gift, but is done solely for seeking nearness to Allah and without expectation of a reward or compensation from the individual. The entire corpus of the property is transferred and possesion is required. The concept is explained later.

2. *'Āriyyah:* Where the corpus is not tansferred to the other party, only the *manfa'ah* (usufruct, benefit) is transferred, by delivering the property to the other party for use, the contract is called *'āriyyah*. It is the permission to use property. The corpus is not destroyed by use and is returned after use to the owner. It is called commodate loan. Certain forms of bailment fall under this concept.

3. *Qarḍ* (loan): This is exactly like *'āriyyah* above, with the difference that the corpus given for use is consumed or destroyed through use; like wheat, money and so on. The consumption or destruction of property gives rise to the liability *(ḍamān)* of returning the principal *(aṣl)* to the owner in the form of identical substitute, like wheat for wheat or *dinārs* for *dinārs*.

4. *'Umrā*: This term is not to be confused with *'umrah* (pilgrimage). When a person says to another, "This house is yours for your life; if I die before you it will be yours permanently, but if you die before me it will revert to me." The Ḥanafī school treats this as a gift proper invalidating the stipulation of time, which is life of the donee in this case.

5. *Ruqbā*: This is exactly the same as *umrā* above, except that in some cases it may admit of a period shorter than life, implying that the owner can take it back when he likes. The Ḥanafī school treats this as a gift proper invalidating the stipulation of time, which is life of the donee in this case.

6. *Minḥah* (grant); *naḥl* (gift), *'aṭī'ah* (grant): These terms are all given the rule of *hibah* by the Ḥanafī school.

.4 The contract of gift is a weak contract and therefore ghayr lāzim (terminable)

Hibah (gift) is a valid (*jā'iz*) contract and its permissibility is proved through the Qur'ān and *Sunnah*. A gift is given for three reasons: (i) it is given to a close relative due to affection for the relative; (ii) it is given to a stranger without demanding a return gift, but with the expectation of a return gift; and (iii) it is given to a stranger with the stipulation of a return gift or counter-value. The reasons stated in points (ii) and (iii) make it a weak contract, therefore, it is considered revocable or terminable, which is called *ghayr lāzim* in *fiqh*.

The contract is not terminable unilaterally and is based upon the consent of the donee or the decree of court. Further, it is confined to case (ii) in the previous paragraph. In this case too a number of restrictions are imposed that prevent it from becoming terminable. This will be explained below.

18.5 The offer cannot be made contingent, linked to the future or pertain to non-existent property

The definition of *hibah* (gift) and the distinctions drawn indicate that the offer of gift cannot be made dependent upon time or linked to the future, or pertain to property that will be created in the future. A gift is the immediate transfer of ownership of property that exists and is present. This may have consequences for actionable claims (choses in action).

CHAPTER 19

THE CONDITIONS OF GIFT (HIBAH)

19.1 Conditions Pertaining to the Donor

19.1.1 The donor must be sane and a major having the legal capacity to make a gift

Hibah (gift) is an act of voluntary donation (*tabarru'*), therefore, it must be made by one who has the legal capacity to make a donation. The person who has such a capacity is sane and a major.

A gift made by a minor or by an insane person is not valid, as it as an act of incurring loss and they do not have the capacity to undertake such an act, just as they do not have the right to grant divorce or to emancipate a slave.

19.1.2 The father as *walī* does not have a right to make a gift on behalf of a minor or an insane person

The father (as *walī*) does not have the right to make a gift on behalf of his son or on behalf of an insane person, as it is an act of loss without a counter-value.

If the father stipulates a counter-value (*'iwaḍ*) for making such a gift, it is still not permitted according to Abū Ḥanīfah and Abū Yūsuf, but Imām Muḥammad said that it is permitted if he stipulates a counter-value.

19.2 Conditions Pertaining to the Property and Donee

19.2.1 The property must be present at the time of making the gift

The property must be present in physical form at the time of making the gift. It is not permitted to gift property that will be present at a future date like the future fruit of a tree or the offspring of an animal. It is also not permitted to gift things like an existing foetus of an animal or the milk in the udder of a cow, because of uncertainty, even if the animal is delivered to the donee to obtain the gifted thing. The rule is applied strictly and even flour in wheat that is present is not allowed.

This rule is different from the rule for bequest (*waṣīyah*) as associating something to what is after death is permissible, and possession is not a condition in bequest. The rule is also different from the case of a debt claim gifted to a third person for obtaining possession, which is permitted by way of *istiḥsān* as discussed below. An argument similar to debt is given for wool on the back of the animal if the animal is delivered for recovery and shearing. This is done on the basis of *istiḥsān* as wool on the animal or milk in the udder is not considered wealth (until separated).

19.3 *The property must be marketable wealth, that is, it must have some value according to the law*

The property must be marketable wealth, which has a value in the eyes of the law. Thus, a gift of things that are not property at all, like a freeman, carrion, blood, and swine, is not permitted. These things have no legal value for a Muslim.

The property must be wealth in the absolute sense and not wealth in part and not so in part, like slaves who are partly free: *umm al-walad*, *mudabbar* and *mukātab*. Things that are not assigned a value under the law, like wine, that is, not marketable by Mulims cannot be gifted either. Wine can be converted into vinegar, but in its state as wine it has no value.

19.4 *The donor must own the property whether it is property in the physical sense or debt*

The donor must own the property that is the subject of *hibah* (gift). Property not owned by the donor cannot be the subject of a gift without the permission or authorisation of the owner.

Property which is claimed by another or to which the right of a third person is attached, like the right of a mortgagee, cannot be the subject-matter of a gift.

A debt claim can be the subject-matter of a gift if it is made to the debtor himself. A debt claim may be gifted to a person other than the debtor for taking possession of the debt from the debtor. This is permitted on the basis of *istiḥsān*. Analogy (*qiyās*) dictates that it should not be permitted even if the credito/donor has granted the donee permission to take possession, because possession is an essential condition of a gift and being a debt makes posession probable. This is distinguished from the case of the debtor to whom the gift is made as he already exercises possession over the debt. The basis for *istiḥsān* is that there is a possibility of delivery because the debtor is compelled to pay his debt under the law.

Equity of redemption: It was held by some courts in British India that a gift may be made by a mortgagor of his equity of redemption. Equity of redemption is the right of the mortgagor to redeem his property by paying off the mortgagee and to prevent foreclosure. The correct position appears to be that a gift of equity of redemption is not valid when the property is in the possession of the mortgagee. Constructive possession is not enough for purposes of gift. It is also difficult to hold that possession can be delivered when the right of a third party (*istiḥqāq*) is attached to the property, because this brings into question the unfettered ownership of the donor himself, as stated above. Further, the rules of equity of English common law cannot restrict the rules of Islamic law.

19.5 The validity of gift of actionable claims or choses in action depends upon the ijtihād of the school

The permissibility of a gift of debts may lead to the conclusion that actionable claims—like shares, copyrights, patents, trademarks and so on—may also be permitted. The difference between debt and actionable claims is that debt is recognised as wealth by the school whereas actionable claims or "choses in action" as they are called are pure rights that have not been declared valid by the school as yet.

The opinions rendered so far about the legality of actionable claims as property under Islamic law are based not upon reasoning from within the school, but on "picking and choosing" opinions from the other schools and giving rational arguments. Such a methodology is not valid. Further, the arguments advanced by modern scholars based upon such reasoning are flawed. Till such time that the school approves the validity of actionable claims as *māl* (property), gifts of such claims should be considered void.

19.6 The property must permit physical possession; gift of undivided property (mushā') is not permitted

Gift of undivided property (*mushā'*) is not allowed in things that can be divided or partitioned. It is allowed in undivided property that is not subject to division or partition, like a horse, a vase and other such things. According to Imām al-Shāfi'ī, it is allowed in both cases.

The prohibtition is based upon traditions and the fact that the essential condition of possession cannot be met to complete the concept of a gift. The permission in those things that cannot be divided is based upon necessity (*darūrah*), but there is no such necessity where the thing can be divided or partitioned. Further, if it was allowed in such things, ownership would stand transferred to the donee, and the nature of a gift would change to one of a contract of liability (*damān*) as the donee would demand division; and if during division the property is destroyed, the donee would have the right to demand compensation. In things not subject to division this problem will not arise.

19.7 The statement that a gift of mushā property is to be treated as an irregular (fāsid) gift is incorrect

It is stated in certain codes made during British times in India that the gift of *mushā'* property that can be partitioned is to be treated as an irregular (*fāsid*) gift till such time that division is undertaken and property delivered, after which it will be deemed to be valid. This statement is incorrect as it ignores the basis of a *fāsid* contract.

Possession is the essential element (*rukn*) of a gift, and when the *rukn* is missing the contract is void. Such a contract cannot be rectified later. The correct position is that the gift is suspended (*mawqūf*) till such time that possession is delivered. The gift is not complete in the state of suspension, that is, title does not pass to the donee till possession is delivered.

19.8 The property must be taken into physical possession by the donee

It is an essential condition that the property gifted be taken into physical possession by the donee. Till such time that the donee takes it into possession the property remains in the ownership of the donor, who may dispose of it as he likes. Imām Mālik (God bless him) said that possession is not a condition for a gift and the donee comes to own it prior to taking possession, as in the case of a sale.

Possession in order to be valid must be taken with the permission of the donor. Possession with the permission of the seller is required even in a sale where the buyer has already become the owner of the sold property, but in the case of a gift possession is an essential element and the donee is not the owner, therefore, permission is deemed necessary.

Possession must be taken when the property is not "occupied" by other property or something else, for example, in the possession of a house the house should be empty and not filled with the assets of the donor or someone else. In the case of a truck loaded with goods, the goods are to be off loaded when they are not the subject of the gift.

Tenants: In the light of the previous rule, a house in possession of tenants, that is, "occupied" by tenants, cannot be the subject of a gift, unless the tenants agree that they are holding the house on behalf of the donee and agree to pay the rent to the donee.

For possession to be valid, the donee must possess the legal capacity for taking property into possession. Thus, possession by an insane person or a minor who cannot discriminate is not valid. Majority is not a condition, and a discriminating minor is permitted to take possession on the basis of *istiḥsān*, because this is an act that is pure benefit. Gifts for the insane and minors can be taken into possession by the *walī* or by a foster parent.

When the property is already in the possession of the donee, such a possession is not to be renewed and the donee becomes the owner by virtue of the donee's offer alone. Examples of such cases are the bailee, mortgagee, and the borrower by way of *'āriyyah* and *qarḍ* or any other person who is exercising lawful possession over the property. Such possession is also allowed in the case of possession by a usurper of property or one who is in possession due to a *fāsid* contract.

Possession is not necessary when a father makes a gift of property to his minor child. It is necessary when the gift is made to children who are major. According to Abū Yūsuf, justice demands that when a father gives gifts to his children he should treat them equally with respect to gifts and the amount of gifts; giving equally to both males and females. Imām Muḥammad maintains that justice demands the giving of two shares to the male and one to the female, according to the rules of inheritance. The father has the right to deny gifts to some of his children at his discretion, because he is the owner of the property and there is no restriction on him with respect to voluntary donation.

CHAPTER 20

THE LEGAL EFFECTS OF GIFT

20.1 The primary legal effect is the transfer of title to donee

The primary legal effect is the passage of title to the donee, without any compensation or counter-value, after the two elements of offer and possession are complete. If either the donor or the donee dies prior to possession, the gift stands anulled.

The transfer of title is non-binding, that is, *ghayr lāzim* or terminable. The transfer of title can be reversed, unless some external factors intervene. Imām al-Shāfi'ī said that the transfer of title is binding and it cannot be reversed or terminated.

20.2 The gift can be revoked in a limited number of cases

The right to revoke the gift is considered morally abominable, but legally valid.

20.2.1 Cases in which a gift cannot be revoked

The donor cannot revoke the gift in the following cases:—

(*a*) A gift given to kindred within the prohibited degree cannot be revoked, even the donor's own child. A gift made to a relative who is not in the prohibited degree can be revoked.

(*b*) A gift given to a husband or to a wife cannot be revoked.

(*c*) A gift given to a poor person is treated as *ṣadaqah*, which cannot be revoked.

(*d*) A gift made to a stranger or to a relative, who is not in the prohibited degree, but for which the donor has charged an *'iwaḍ* (counter-value; consideration), cannot be revoked.

According to some jurists. gift to kindred within the prohibited degree, husband and wife, and *ṣadaqah* to a poor person are in reality sub-classes of *hibah bi'l-'iwaḍ*.

20.2.2 Restriction on revocation due to external factors

A gift made to a stranger or to a relative, who is not in the prohibited degree, may be revoked, but the following factors prevent revocation:—

(*a*) When the property has increased physically through an increase that is physically linked to the property, like a house on which another story has been constructed, or land in which plantation has taken place, a cloth that has been dyed or stitched. A rise in price or the accumulation of *ribā* is not considered an increase. A decrease in the value of the property does not prevent revocation.

(*b*) When the property is no longer in the ownership of the donee, that is, he has sold it or given it away as a gift.

(*c*) If the donor dies, the heirs do not have the right to revoke the gift.

(*d*) If the donee dies after he has taken possession of the gift. The property now belongs to his heirs.

20.2.3 Revocation is with consent of donee or through judicial decree

Revocation of a gift cannot take place without the consent of the donee as it amounts to cancellation (*faskh*) of the contract.

20.3 *Hibah bi'l-'iwaḍ or gift for a consideration*

Gift with a consideration or *'iwaḍ* is a gift in which the donor expects some compensation from the donee for making the gift. *'Iwaḍ*, which may be called consideration, compensation or counter-value, is of two types: consideration after the conclusion of the gift contract; and consideration stipulated in the offer of the gift.

20.3.1 *'Iwaḍ* after the contract

An *'iwaḍ* after the contract of gift is in reality a counter-gift by the donee. It is like the donee saying, "This is a counter-value for your gift," "This is in lieu of your gift," "This is in return for your *ṣadaqah*." In all these statements, the counter-value is linked to the earlier gift of the donor. This is *'iwaḍ* that will prevent revocation by the first donor. The donee may make a gift to the donor that is indpendent of the earlier gift. In such a case, each donor will retain the right of revoking his gift. There are three conditions for an *'iwaḍ* to be effective in preventing a revocation: (a) It should be in lieu of the gift and be linked to it; (b) It should not be paid from the property received as a gift; and (c) The donor should take possession of the *'iwaḍ*, which is an indication of his consent.

20.3.2 *'Iwaḍ* at the time of the contract

As for *'iwaḍ* that is stipulated initially in the gift like the donor saying, "I gift you this property on the condition that you give me this horse," it amounts to an *'iwaḍ* that prevents revocation of the gift. The three jurists maintain that this transaction is initially a gift, so that all the conditions like *mushā'* and others apply, and ownership is transferred on taking possession, but once concluded it takes the rule of sale, so that it can be returned due to defect, absence of inspection, third-party claims, with pre-emption working if it is land.

20.4 *Legal effects of maraḍ al-mawt on gift*

Gift during death-illness is just like *hibah* during health. It is completed with possession and ownership is transferred, but up to one-third of the estate of the deceased. If possession is not taken prior to the death of the donor, the gift becomes void.

The difference between a gift during *maraḍ al-mawt* and a bequest is that ownership is transferred after the death of the legator, but in a gift made during death illness ownership stands transferred and is then limited to one-third of the estate after the death of the donor. If a person gifts his house during illness to a person, when that house was his entire property, the donee will be allowed to retain one-third of the house and he will pay the value of the remaining two-thirds to the heirs. The same will apply if the donee sells the house prior to death. A judicial decree will be required for the return of the property itself, if the property still exists in the possession of the donee.

The heirs of the donor may permit the operation of the gift beyond one-third of the estate.

If a donor, who made the gift during health, revokes the gift when the donee is undergoing *maraḍ al-mawt*, the revocation will take effect only through a judicial decree (consent of the donee will have no legal effect). The creditors and the heirs of the donee will have no recourse to the donor in such a case.

CHAPTER 21

ṢADAQAH, ʿĀRIYYAH, AND QARḌ

21.1 Ṣadaqah (Charity)

21.1.1 *Ṣadaqah* (Charity) resembles gift in several respects

Ṣadaqah has the same legal status as a gift with respect to the taking of possession of the property on the part of the recipient, and also with respect to the rules pertaining to *mushāʿ* (undivided property).

There is also no difference between *ṣadaqah* and a gift when given to a person who possesses the *niṣāb* and one who does not, that is, one who is reasonably well off and one who is not, or between the rich and the poor.

21.1.2 Distinction between *ṣadaqah* (charity) and *hibah* (gift)

In *ṣadaqah*, the donor does not intend or expect any kind of *ʿiwaḍ* (return; counter-value) from the recipient or donee, but in a gift he may expect such a return or even demand it from the donee. The giver of charity expects a spiritual reward (*thawāb*) from Allah Almighty.

Revocation or return of the property given is possible in a gift, but revocation of charity is not permitted. If a person gives a gift to the poor or to one who comes seeking alms, he cannot revoke such a gift as it is treated like *ṣadaqah*.

21.1.3 Different situations arising from an act of *ṣadaqah* (charity)

If a person in a state of health says, "All that I own is *ṣadaqah* for the poor," it will be interpreted as his moveable wealth that is subject to *zakāt*, but it will not include his immoveable property.

There is no harm if a person gives charity to another and then he inheirts the same property from the other person upon the death of such other person.

If a person in health says, "The rent of this house is *ṣadaqah* for the poor," and then dies before delivery of possession by a recipient, the rent becomes part of his heritable estate.

If a person builds a mosque within his house, while he still lives in part of the house, and people come and pray in it, the mosque will remain part of his heritable estate.

21.2 'Āriyyah (Gift of Benefits; Lending of Property; Bailment)

21.2.1 The meaning of *'āriyyah* and its essential element

'Āriyyah means the transfer of ownership of usufruct (benefits) of moveable or immovable property to another without *'iwaḍ* (compensation or consideration). It is called *'āriyyah* as it is devoid of a return benefit.

The essential element of *'āriyyah* is an offer from the lender (*mu'īr*). As for acceptance from the borrower (*musta'īr*), it is not considered part of the *rukn* (essential element) by the three jurists, on the basis of *istiḥsān*. Analogy dictates that it should be part of it. The issue is similar to *ḥibah* in relation to vows.

The offer is explicit with the word *'āriyyah*, but other words that clearly convey the intention to transfer the benefits and not the corpus of the property are also accepted, like "I will feed you from this land," or "This land is yours for purposes of sustenance." When words implying a gift are used in an unqualified sense, they can be interpreted to mean *'āriyyah*.

21.2.2 The conditions of the essential element of *'āriyyah*

The conditions are as follows:—

1. **Sanity and discretion:** The person making the offer of *'āriyyah* must be sane and possess discretion. *'āriyyah* cannot be made by an insane person or by a minor who cannot discriminate between right and wrong. Majority (*bulūgh*) is not a condition and a minor authorised by his *walī* can lend property to another. Imām al-Shāfi'ī disagrees.

2. **Possession:** Possession by the borrower (*musta'īr*) is an essential condition, because *'āriyyah* is an act of donation, and by itself the offer does not complete the contract, unless there is possession, as in the case of *ḥibah*.

3. **Normal use of property should not lead to destruction or consumption:** The property borrowed must be one that can be benefited from without leading to its consumption or destruction, as in the case of land, a horse, a car, tools of trade and so on. If the property stands consumed or destroyed by normal use, as in the case of wheat or currency, *'āriyyah* is not valid. The reason is that

the legal effects are established for the benefits alone and not the corpus of the property.

4. **No need to specify a period of use:** *'Āriyyah* is valid even if a period of borrowing is not specified.

21.2.3 The legal effects of the contract of *'āriyyah*

21.2.3.1 TRANSFER OF OWNERSHIP IN BENEFITS

The legal effect of *'āriyyah* is that ownership in the benefits stands transferred to the borrower till such time that the lender demands it back, the specified period is over, or the borrower returns it on his own. According to al-Shāfi'ī (God bless him), no ownership is transferred to the borrower, it is merely permission to use the property.

The result of the above legal effect is that the borrower can further lend the property as he owns the benefits. According to Imām al-Shāfi'ī, he cannot lend it further to another person, because he does not own the benefits.

21.2.3.2 ABSOLUTE AND RESTRICTED LENDING

'Āriyyah is either absolute or it is restricted. Absolute lending means that no place, time or period of use is specified. In restricted lending, the place, time, period and manner of use may be specified. Absolute lending is restricted by customary practice.

The ownership established for the borrower is *ghayr lāzim*, that is, non-binding. Thus, the lender can demand his property back whenever he likes, even if a period of use had been specified. If, however, the lender had given his land to the borrower for cultivation, he cannot take it back until the borrower has harvested the crops he had planted.

21.2.3.3 THE CONTRACT CAN BE REVOKED

As *'āriyyah* is a non-binding contract giving the authority to the lender to take back his property whenever he likes, the lender is not permitted to let out the property on hire to a third person, because *ijārah* is a bidning contract and the specfied period has to be observed. The borrower may lend the property to another on the same terms, so he can take it back when it has been demanded from him.

21.2.4 The nature of possession exercised by the borrower of property

21.2.4.1 PROPERTY HELD IN TRUST

The borrower holds the borrowed property in trust (*'amānah*) during the time of day (or night) when it can be put to use and also during the time when it cannot be put to use. The borrower is not liable to compensate the lender if the property is destroyed during the exercise of such possession. According to Imām al-Shāfi'ī, the borrower is liable to compensate the lender if the property is destroyed during a time when such property is not customarily put to use.

21.2.4.2 BAILMENT AND 'ĀRIYYAH

The possession of the borrower is like that of a bailee, that is, he will be held liable for compensation if there is transgression or negligence on his part, but not otherwise. The difference between bailment for the sole benefit of the bailee and *'āriyyah* is that such bailment is permitted only in moveable property, while *'āriyyah* is permitted for real estate as well, that is, this type of bailment is for commodate loans alone.

21.2.4.3 RETURN OF PROPERTY

The borrower is also liable if the property is demanded back by the owner/lender, or the specified period of use is over, but he continues to hold it after that and the property is destroyed.

If the borrower returns the property to the owner/lender, to his representative, or family member, either himself or through his representative, he cannot be held liable for loss. Customary practice will be acknoweledged in such cases for determining what is reasonable.

In case of a dispute between the lender and the borrower about a certain stipulation, it is the statement of the lender that will be given preference.

21.3 Qarḍ (Loan)

21.3.1 The meaning of *qarḍ* (loan) and its essential element

Qarḍ (loan) means the transfer of ownership (title) in fungible moveable property without the stipulation of an *'iwaḍ* (return benefit) where the moveable property stands consumed or destroyed by use creating a liability for the borrower to return a similar property on demand by the lender.

Qarḍ is similar to *'āriyyah* with the difference that in *'āriyyah* the property borrowed is not destroyed and the same property has to be returned, while in *qarḍ* a similar has to be returned.

Qarḍ of currencies is actually a part of the contract of *ṣarf* (exchange of currencies), but it is discussed here as it is an act of charity and a loan can be given in things other than currency.

The term *qarḍ ḥasan* is sometimes used for this transaction, but is actually a misnomer as *qarḍ ḥasan* refers to a transaction between the servant and the Almighty Creator, as mentioned in the Qur'ān.

This is the only type of *qarḍ* (loan) acknowledged by the *sharī'ah* as valid. The details will be discussed in the Book of *Ṣarf*.

The essential element (*rukn*) of *qarḍ* is offer and acceptance, according to the predominant view. The other view considers offer alone to be the essential element as in the case of *hibah* and *'āriyyah*. In *qarḍ*, as a liability is created for returning a similar, the contract is considered a contract of sale with offer and acceptance as the essential element.

21.3.2 The conditions of *qarḍ* (loan)

Qarḍ (loan) is an act of donation as there is no counter-value or *'iwaḍ* (return benefit), therefore, the insane person, the minor, the *walī* or *waṣī* of a minor do not have the capacity to undertake the *qarḍ* transaction.

Possession by the borrower of the property loaned is an essential condition for *qarḍ*, just as it is in *'āriyyah* and *hibah*.

Qarḍ is valid in things that have a *mithl* or exact similar, and these are commodoties sold by weight, cubic measure or those countable things that are very similar to each other like eggs and loafs. In commodities that are not fungible, that is, do no have similars like animals, various kinds of fruit and other dissimilar things, *qarḍ* is not permitted.

Qarḍ is treated in a manner similar to *'āriyyah*, therefore, it is not necessary to specify a period of repayment.

A benefit for the lender cannot be stipulated in the contract of *qarḍ*. If it is stipulated, it amounts to *ribā* and renders the contract *fāsid*.

21.3.3 The legal effects of *qarḍ* (loan)

The view of the Ẓāhir al-Riwāyah is that immediately upon conclusion of the contract (and possession by borrower) title in the property borrowed stands transferred to the borrower and a corresponding liability of paying back by *mithl* (similar) is attached to the *dhimmah* of the borrower. According to Abū Yūsuf, this happens the moment the borrower uses the property in whole or in part.

A period of payment need not be specified, and even when it is specified, the lender has the right to seek early repayment.

As *qarḍ* is an act of charity, it is recommended that the lender not fix a period and seek repayment when the borrower is enjoying financial ease. It is to be noted that being a transaction of charity, the contract of *qarḍ* does not accept agency as no one can seek charity for another.

To ensure repayment, the lender has a right to seek collateral or surety for repayment.

Part VI

THE BOOK OF *FARĀ'IḌ* (INHERITANCE)

CHAPTER 22

GENERAL RULES AND CATEGORIES OF HEIRS

22.1 *All financial claims of an individual who has died are related to his estate*

22.1.1 Claims by the estate

When a human being dies all amounts due to him are to be claimed by his estate. The estate (*tarakah*) comprises all financial claims. As for pure rights, some are inherited, while others are not inherited. An amount owed to the deceased on account fo *diyah* or *ṣulḥ* is part of the estate.

22.1.2 Claims upon the estate

All claims upon the estate are satisfied from the estate, beginning with rights in the order of their strength. The first claim on the estate of the deceased is that of the deceased's preparation for burial, shroud, and burial. If a person dies having no wealth at all, the expenses of his burial are to be borne by the Muslims, that is, the treasury (*bayt al-māl*). The *bayt al-māl* is not to pay off his debts.

After the burial, his debts are to be given priority over his bequest if any. If the debts are not paid they prevent the execution of the bequest and distribution of inheritance.

After the debts have been satisfied, the bequest is to be executed and it prevents the distribution of inheritance up to a third of the estate. What is beyond one-third is not prevented, unless the heirs agree to the execution of what is beyond one-third.

After burial, satisfaction of debts and execution of bequest, the estate is to be distributed among the heirs.

22.2 *Causes that lead to inheritance and those that prevent it*

Besides *'uṣūbah* (state of belonging to the *'aṣabah* or being a residuary), the causes that lead to inheritance are three: *nikāḥ* (marriage), *raḥm* (womb), and *walā'*. *Walā'* is of two types: *walā'* resulting from emancipation of slaves and *walā'* arising from a contract of friendship between the deceased and another person (*muwālāt*).

The causes that prevent inheritance are three: slavery, difference of religion and unjustified homicide.

22.3 The categories of heirs

Heirs (*aṣḥāb al-mawārīth*) fall into three categories:—

(*a*) The *'aṣabāt* (agnates) who inherit on the basis of *'uṣūbah*, which is the state of being related to the male side of the family either directly or in conjunction with other agnates. They are referred to as the residuaries.

(*b*) The *aṣḥāb al-farā'id* or those for whom fixed fractional shares have been identified in the sources. They are called the sharers.

(*c*) The *dhawū 'l-arḥām* are relatives who are related to the deceased through a female whether on the mother's side or the father's side. They are defined as "close relatives who are not entitled to inheritance on the basis of *farīḍah* (being sharers) or on the basis of *'uṣūbah* (being residuaries), whether these relatives are males or females." They are considered the outer family even though they may be closely related to the deceased. They usually inherit in the total absence of the above two categories, with the exception of the case of one of the spouses with whom they may share under certain circumstances. Legal disputes are more likely to arise in the case of this category.

22.4 The 'aṣabāt or the agnates

The *'aṣabāt* are not counted by number rather they are reckoned by category. According to category, the *'aṣabāt* are divided into three categories: (a) *'aṣabah bi-nafsihi* (agnate by himself); (b) *'aṣabah bi-ghayrihi* (agnate by another); and (c) *'aṣabah ma' ghayrihi* (agnate along with another).

22.4.1 *'Aṣabah bi-nafsihi* (agnate by himself)

'Aṣabah bi-nafsihi (agante by himself) is a male who is linked to the deceased through a link that has no intevening female between them, like the son or his son. The closest *'aṣabāt* in this category are: the son,

son's son how low soever; the father, the father's father (grandfather) how high soever; real brother (same father and mother), paternal brother (same father), son of real brother, son of paternal brother; uncle of father and mother, paternal uncle of father; son of uncle of father and mother, son of father's paternal uncle; and so on. In these relationships, the son has greater *qarābah* (nearness) to the deceased than the father, and the father is nearer than the grandfather. The nearness is established through the number of links, thus, the brother is linked to the deceased through a single link, while the uncle is linked through two links.

22.4.2 *'Aṣabah bi-ghayrihi* (agnate by another)

The *'aṣabah bi-ghayrihi* (agnate by another) is a female who becomes *'aṣabah* through a male who is at the same level as a male *'aṣabah*, like the daughter of the deceased with her brother.

22.4.3 *'Aṣabah ma' ghayrihi* (agnate along with another)

The *'aṣabah ma' ghayrihi* (agnate along with another) is like sisters of the deceased who become *'aṣabah* along with the daughters of the deceased. The difference between this and the previous type is that the *'aṣabah* whom they are joining are not *'aṣabah* by themselves.

The meaning of becoming *'aṣabah* is that like the *'aṣabah bi-nafsihi*, they may exclude some of the more remote *'aṣabah* even when there is no male heir.

22.5 The aṣḥāb al-farā'iḍ or the sharers

The *'aṣḥāb al-farā'iḍ* are those heirs whose fractional shares have been fixed and established by the Book, the *Sunnah* or *ijmā'* (consensus). These shares cannot be fixed through analogy as *qiyās* has no role to play in this area.

22.5.1 The twelve sharers

The sharers are twelve in all. Four of these are men, while eight are females. The men are: the father, the grandfather, the husband, and the uterine brother (with the same mother but not the same father). The females are: mother, grandmother, daughter, son's daughter, real sister (same mother and father), consanguine sister (same father), uternine sister (same mother), and wife.

22.5.2 Those who maintain their position

Six of these sharers maintain their position of sharer under most cases. These are: the husband, uterine brother (same mother), mother, grandmother, uterine sister, and wife.

22.5.3 Those who shift their position

The remaining six shift their position between *farīḍah* (having a fixed share) and *'uṣūbah* (being a residuary). These are: the father, grandfather, daughter, son's daughter, real sister (same father and mother), and germane sister (same father). (See previous section about the types of *'aṣabāt*).

CHAPTER 23

THE CHILDREN OF THE DECEASED

23.1 The Children

23.2 A single son may in some cases take the entire estate

When the deceased leaves behind one son as the only child, the son inherits the entire estate.

The position of the eldest son, under the *sharī'ah*, is not like his position that existed during the Jāhiliyyah. When there are two or more sons, as the only children, the estate is divided equally between them.

All other residuaries are excluded in the above cases.

23.3 A single daughter as the only child inherits one-half of the estate

When the deceased leaves behind one daughter as the only child, she inherits one-half of the entire estate.

When there are three or more, they inherit two-thirds of the estate according to the text of the Qur'ān.

When there are only two they inherit two-thirds of the estate according to most of the Companions (God be pleased with them) and according to most jurists (God bless them).

23.4 When the heirs are sons and daughters, the division is based upon the ratio: for the male two shares of the female

When the deceased leaves behind sons and daughters as heirs, the estate is divided among them according to the Qur'ānic rule: "For the male two shares of the female." The daughters become *'aṣabah bi-ghayrihi* in this case.[68]

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[68] Women have sometimes been deprived unlawfully of their legitimate share of inheritance. The Supreme Court, in the well known case *Ghulam Ali et al. v. Mst. Ghulam Sarwar Naqvi*, PLD 1990 SC 1, has held that in cases of inheritance

All other residuaries are excluded.

23.5 *When there are no immediate heirs, but children of children, the children of the son represent the immediate heirs and share accordingly*

When the deceased leaves behind children of a son and children of a daughter, when the sons and daughters have died, the children of the son stand in the place of the immediate children and inherit accordingly, that is, according to the Qur'ānic rule: "For the male two shares of the female."

The children of the daughter do not inherit as they are treated as distant kindred. The Muslim Family Laws Ordinance, 1961 alters this rule.

23.6 *When the deceased leaves behind a son and daughters and the children of a predeceased son, the children of the predeceased son do not get anything according to traditional law*

When the deceased leaves behind immediate children and children of a predeceased son, and there is a son among his immediate children, the children of the predeceased son—whether males alone, females alone, or both combined—do not get anything from the estate as they are excluded by the son.

The doctribe of exclusion or *ḥajb* operates in this case. The Muslim Family Laws Ordinance, 1961 alters the rule stated in subsection (1) above.

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brothers cannot legally claim "adverse possession" against their sister to "oust" her. Relinquishment of inheritance by a female without consideration, being void and against public policy, leads to the presumption that such relinquishment was not on account of natural love but on account of social constraints. Consequently, brothers of a female were required by law to protect the rights of their sister if ever they come into possession of their land in any capacity.

23.7 When there is no immediate son but just one daughter, and there is no son among the children of the predeceased son, the daughter of the predeceased son shares with the daugher of the deceased

When the deceased leaves behind no son, but just a daughter, and there is no son among the children of the predeceased son, the daughter gets one-half of the estate, while the grand-daughter gets one-sixth to complete the two-thirds to which the daughters collectively are entitled.

If the deceased leaves behind two daughters, they get two-thirds of the estate and there is nothing for the daughter of the predeceased son.

23.8 When the deceased leaves behing two daughters and children (male and female) of a predeceased son, the daughters get their share and the rest is shared by the children of the predeceased son

When the deceased leaves behind two daughters and children, both male and female, of a predeceased son, the daughters get two-thirds of the estate. The remaining one-third is shared by the children of the predeceased son in the ratio of two shares of the female for the male.

If the deceased leaves behind one daughter and children, both male and female, of a predeceased son, the daughter gets one-half of the estate. The remaining one-half is shared by the children of the predeceased son in the ratio of two shares of the female for the male.

When the deceased leaves behind two daughters, son's daughter, son of a son of a son, the *ẓāhir* opinion in the school is that the remaining one-third is shared by the son's daughter and the son of a son of a son according to the ratio of two shares for the male and one share for the female.

CHAPTER 24

THOSE WHO SHARE WITH CHILDREN

24.1 *Those who participate in inheritance with the children of the deceased are six persons*

The persons who can participate in the inheritance with the children of the deceased are six persons: the father, the paternal grandfather how high soever, the mother, the maternal grandmother (mother's mother), paternal grandmother (father's mother) and the wife.

Persons other than these do not inherit with the son either as sharer or as residuary. Persons other than these do not inherit with the daughter as sharer, even though they can inherit as residuaries.

24.2 *The father*

The father has three states in inheritance: as sharer, as residuary, and as both.

He is a sharer when the deceased leaves behind a son, a son's son how low soever. He is a residuary when there is no child (male or female), child of the son (male or female).,He shares in both capacities with the daughter and son's daughter.

His share is $\frac{1}{6}th$, which is not to be decreased except through the method of reduction (*'awl*), and is not to be increased in his capacity as sharer under any circumstances. Thus, when there is a child among heirs, the share of the father is $\frac{1}{6}th$.

When the deceased is survived by parents and no child, the mother gets $\frac{1}{3}rd$, while the father gets $\frac{2}{3}rd$, that is, he takes the remaining.

When the deceased leaves behind one daughter and a father, the father gets $\frac{1}{6}th$ as sharer, while the daughter gets $\frac{1}{2}$. The father then takes the remaining $\frac{1}{2}$ as a residuary.

The father excludes the brothers of the deceased from inheritance.

The share of the father is reduced due to the existence of the deceased woman's huband.

The grandfather (father's father) represents the predeceased father, except when sharing with a spouse, as will be explained later.

24.3 The mother

The mother is a sharer, and she has two types of shares in inheritance: $\frac{1}{6}th$ or $\frac{1}{3}rd$. Her share is not to be reduced below $\frac{1}{6}th$, except in the case of reduction (*'awl*), and is not to be increased beyond $\frac{1}{6}th$, except in the case of return (*radd*).

She is entitled to $\frac{1}{6}th$ when she shares with a child or with the deceased's brother.

She is entitled to $\frac{1}{3}rd$ when there is no surviving child, and no one else besides the parents.

The share of the mother is not reduced due to the existence of the deceased woman's huband.

24.4 The grandmothers

The grandmother is a sharer, and her share is $\frac{1}{6}th$.

In this context, the paternal grandmother and the maternal grandmother are the same. If both are present, they share $\frac{1}{6}th$.

The share of the grandmother is not to be reduced below $\frac{1}{6}th$ even when there is more than one grandmother, except in the case of reduction (*'awl*), and is not to be increased beyond $\frac{1}{6}th$, except in the case of return (*radd*).

24.5 The husband and wife

The husband is a sharer, and he has two types of shares:—

24.5.1 The husband

1. His share is $\frac{1}{2}$ in the absence of an immediate child and the absence of the child of the son, male or female.

2. His share is $\frac{1}{4}$ when there is a child of the deceased or the child of the son, male or female.

24.5.2 The wife

The wife is a sharer, and she has two types of shares:—

1. Her share is $\frac{1}{4}$ in the absence of an immediate child and the absence of the child of the son, male or female.

2. Her share is $\frac{1}{8}$ when there is a child of the deceased or the child of the son, male or female.

3. When there is more than one wife, the $\frac{1}{4}$ or $\frac{1}{8}$, as the case may be are shared equally by them.

24.5.3 Common rules for both

Reduction (*'awl*) and return (*radd*) apply to the spouses as well.

The husband and wife cannot be excluded by anyone on the basis of *hajb* (doctrine of exclusion). They are excluded from inheritance only in the case of killing the other spouse, committing apostasy, or if they become enslaved.

24.6 The Doctrine of Exclusion (*Ḥajb*)

The principle of exclusion (*ḥajb*) is of two types: *ḥirmān* (complete deprivation) and *nuqsān* (partial deprivation).

24.6.1 *Ḥajb al-ḥirmān*

Ḥajb al-ḥirmān is complete deprivation, like the deprivation from inheritance in the case of the grandfather who is excluded by the father, and the grandmother who is excluded by the mother.

24.6.2 *Ḥajb al-nuqasān*

Ḥajb al-nuqasān is partial deprivation, like the reduction of the share of a husband or wife in the presence of the child of the deceased or the child of the son of the deceased.

24.6.3 Exception

A person who has killed the deceased, has become a slave, or has committed apostasy cannot exlcude another person in both forms of the doctrine, because such a person is deemed to be dead for purposes of inheritance.

CHAPTER 25

THE SHARES OF BROTHERS AND SISTERS

25.1 The meaning of the term kalālah

The term *kalālah*, by combining the implication of verses and traditions, means a person dying without leaving behind any children or father.

There is a disagreement whether *kalālah* applies to the deceased, who does not leave behind any parent or child, or whether it means the heirs, who do not have a parent or child among them. This disagreement does not affect the shares of the heirs left behind.

25.2 The categories of brothers and sisters

Brothers and sisters are classified into three categories as follows:

(*a*) Germane brothers and sisters, also called full brothers and sisters. In Islamic law, they are called Banū al-A'yān. These are brothers and sisters from the same parents, that is, the same mother and father.

(*b*) Consanguine brothers and sisters. In Islamic law, they are called Banū al-'Allāt. These are children of a man from different wives, that is, brothers and sisters who have the same father, but different mothers.

(*c*) Uterine brothers and sisters. In Islamic law they are called Banāl-Aḥyāf. These are children of a woman from different husbands, that is, brothers and sisters from the same mother, but different fathers.

The first two categories, that is, the germane and consanguine brothers and sisters inherit as agnates or *'aṣabah*. The uterine brothers and sisters inherit as sharers or *aṣḥāb al-farā'iḍ*.

25.3 The Uterine Brothers and Sisters

25.3.1 The uterine brothers and sisters

The uterine brothers and sisters inherit as sharers or *aṣḥāb al-farā'iḍ* with each one entitled to $\frac{1}{6}th$ whether male or female.

When there are more than two they are equal parters in $\frac{1}{3}rd$.

The individual share of the uterine brothers and sisters is not to be reduced below $\frac{1}{6}th$ even when there is more than one brother or sister, except in the case of reduction (*'awl*), and is not to be increased beyond $\frac{1}{3}rd$, except in the case of return (*radd*).

The doctrine of *kalālah* applies to uterine brothers and sisters. Consequently, they do not inherit with four types of heirs: (a) child, male or female; (b) son's child, male or female; (c) father; and (d) grandfather (father's father).

25.3.2 The share of the uterine brothers and sisters is not reduced due to the existence of germane (full) brothers or sisters: the *ḥimāriyyah*

There is agreement that the share of the uterine brothers and sisters is not anulled due to the existence of germane or consanguine brothers and sisters. There is also agreement on the point that their share is not reduced due to the existence of consanguine brothers and sisters. There was a disagreement in early Islamic law about the reduction of their share due to the existence of germane brothers and sisters as explained below.

A woman died leaving behind a husband, mother, two uterine brothers and two germane brothers. The decision by some Companions (God be pleased with them) was that the husband will get $\frac{1}{2}$, the mother will get $\frac{1}{6}th$, the two uterine brothers will get $\frac{1}{3}rd$, while the two germane brothers will get nothing. The two germane brothers brought the problem to 'Umar (God be pleased with him), who thought that the decision was correct, so the brothers said: "Assume that our father was a donkey, are we not children of the same mother?" It is reported that 'Umar (God be pleased with him) said, "You have spoken in truth," and he permitted them to be partners in the share of the uterine brothers. This is is called the *Ḥimāriyyah* from the word *ḥimār* (donkey).

The opinion adopted by the Ḥanafī school is that of the other Companions (God be pleased with them) who do not give a share to the germane brothers in this case on the basis of the rule that the share of the uterine brothers cannot be reduced due to the existence of the germane or consanguine brothers, because the sharers are to be allocated their share prior to the *'aṣabāt*.

25.4 The Germane (Full) and Consanguine Brothers and Sisters

25.4.1 The germane (full) brothers and sisters

The Banū al-A'yān or the germane (full) brothers and sisters stand in the place of immediate children (sons and daughters) in their absence.

Thus, for example, if there is just one sister as heir, she will get $\frac{1}{2}$ of the remaining estate, while two or more will inherit $\frac{2}{3}rd$. If there is just one brother as heir, he will inherit the entire estate.

When there are brothers and sisters, they will share in the ratio "for the male two shares of the female."

25.4.2 The consanguine brothers and sisters

The Banū al-'Allāt or the consanguine brothers and sisters inherit like the son's children. This means that in the absence of germane brothers and sisters, the consanguine brothers and sisters stand in their place, just like the children of the son stand in the place of the immediate children in their absence.

The males stand in the place of germane males and the females stand in the place of germane females, inheriting like them.

They do not inherit when there is a male from the Banū al-A'yān, that is, a male germane. This rule is similar to the children of the son not inheriting when a son is present among the heirs. The Muslim Family Laws Ordinance, 1961 changed the rule for the children of the son, therefore, it needs to change this rule as well for the sake of consistency in *fiqh*.

25.4.3 Illustrations for the inheritance of germane and consanguine brothers and sisters

Some illustrations are as follows:—

1. If the deceased leaves behind a daughter, a germane brother and a consanguine sister, the daughter gets $\frac{1}{2}$ and the remaining is for the germane brother. The consanguine sister gets nothing.
2. If the deceased leaves behind one germane sister and two consanguine sisters, the germane sister will get $\frac{1}{2}$ and the consanguine sisters $\frac{1}{6}th$ to complete the $\frac{2}{3}rd$. If there were a consanguine brother

and sister in place of two consanguine sisters, they would have shared the remaining in the ratio of "for the male two shares of the female."

3. If in the above case the deceased left behind two or more germane sisters and consanguine sisters, the germane sisters will get $\frac{2}{3}$*rd*, while the consanguine sisters will get nothing. If, however, the two consanguine sisters had a brother with them, they would become *'aṣabah* due to him, and would share the remaining estate in the ratio of 2:1.

4. If the deceased leaves behind one daughter or two daughters and a germane brother or a consanguine brother, the daughter will get $\frac{1}{2}$ and two will get $\frac{2}{3}$*rd*, while the brother (germane or consanguine) will get the remaining.

5. If the deceased leaves behind two daughters, two germane sisters, the sisters become *'aṣabah* along with the daughters, therefore, they will get the remaining one-third.

6. If the deceased leaves behind a daughter, a germane brother and a consanguine sister, the daugher will get $\frac{1}{2}$; the germane brother $\frac{1}{2}$, that is, the remaining, while the consanguine sister will get nothing.

25.5 The Method of 'Awl (Reduction)

25.5.1 The allocation of inheritance is of three types

The allocation of inherited shares is of three types: *farīḍah 'ādilah* (balanced allocation); *farīḍah qāṣirah* (returned allocation); and *farīḍah 'ā'ilah* (reduced allocation).

1. *Farīḍah 'ādilah* (balanced allocation) means that the fractional shares allocated to the heirs are exactly equal to the fractional shares of the estate, thus, they balance out. The allocation is also balanced when any fractional part remaining in the estate, after allocation to the sharers, is allocated to the residuaries or *'aṣabah*. If the deceased leaves behind two germane (full) sisters and two uterine sisters, the two germane sisters take $\frac{2}{3}$*rd*, while the uterine sisters share $\frac{1}{3}$*rd*. The estate is fully allocated.

2. *Farīḍah qāṣirah* (returned allocation) means that the shares allocated to the sharers are less than the fractional shares available in the estate, and there are no residuaries who can be allocated the remaining. If the deceased leaves behind two germane (full) sisters and a mother, then the two sisters take $\frac{2}{3}rd$, while the mother takes $\frac{1}{6}th$, and there are no residuaries who can take the remaining. The remaining is then passed on, or "returned," to the existing heirs through the method of *Radd* (return), which is discussed below.

3. *Farīḍah 'ā'ilah* (reduced allocation) means that the shares allocated to the sharers are more than the fractional shares available in the estate, as in the case of a deceased leaving behind a husband and two germane sisters where the husband is allocated $\frac{1}{2}$, while the sisters are allocated $\frac{2}{3}rd$. The shares will have to be reduced, through the method of *'Awl*, to make a whole number.

25.5.2 The method of *'awl* or "reduction"

The literal meaning of *'awl* in the context of inheritance is "deviation by excess from the limit of the inheritance." It is for this reason that the term is translated as "increase." The term increase reflects the excess fraction that has to be reduced and the decrease distributed proportionately among the sharers. The term "reduction" is, therefore, preferred here. The method of *'awl*, or proportional reduction, reallocates the shares to the sharers by reducing them proportionately so that the sum of the new fractional shares amounts to a whole number or unity.

25.5.2.1 THE CALCULATIONS OF THE JURISTS

The method followed by the earlier jurists was based upon the analysis of the existing shares in terms of a base share of $\frac{1}{6}th$ and working out the excess fraction. This additional fraction was then reduced by determining the new denominator for the new proportionately reduced fractions. For example, if a woman dies leaving behind a husband, daughter, mother and father, the husband gets $\frac{1}{4}th$ (which is $1\frac{1}{2}$ shares in terms of $\frac{1}{6}th$), the daughter gets $\frac{1}{2}$ (which is 3 shares in terms of $\frac{1}{6}th$), the mother and father get $\frac{1}{6}th$ share each (which is 2 shares in terms of $\frac{1}{6}th$). The shares in terms of $\frac{1}{6}th$ together come to $6\frac{1}{2}$, which means $\frac{1}{2}$ share is in excess, which has to be reduced by proportionately allocating the loss among the sharers. The figure $6\frac{1}{2}$, which is the same as $\frac{13}{2}$, yields the the numerator 13, which will become the denominator for the new shares. According to this method, the excess shares in different situations will be: $\frac{1}{2}$ share, $\frac{3}{4}$ share, 1 share, $1\frac{1}{2}$ share, 2 shares, $2\frac{1}{2}$ share, 3 share, and

4 shares. All this has been mentioned for purposes of academic interest and to highlight the meaning of the text in earlier manuals.

25.5.2.2 THE CALCULATION FOLLOWED TODAY

The method followed is to reduce the fractions in terms of a common denominator and then add the numerator to determine the new denominator. The old common denominator is then replaced by the new denominator. The illustrations given below are based upon the excess shares determined by the earlier jurists.

Where a woman dies leaving behind a husband, a daughter, a mother and a father, the allocation and reduction is as follows:

Heir	Orig. Share	Common Den.	Reduced Share
Husband	$\frac{1}{4}$	$\frac{3}{12}$	$\frac{3}{13}$
Daughter	$\frac{1}{2}$	$\frac{6}{12}$	$\frac{6}{13}$
Mother	$\frac{1}{6}$	$\frac{2}{12}$	$\frac{2}{13}$
Father	$\frac{1}{6}$	$\frac{2}{12}$	$\frac{2}{13}$

Note that 3+6+2+2=13.

Where a man dies leaving behind a wife, 2 daughters, a mother and a father, the allocation and reduction is as follows:

Heir	Orig. Share	Common Den.	Reduced Share
Wife	$\frac{1}{8}$	$\frac{3}{24}$	$\frac{3}{27}$
2 Daughters	$\frac{2}{3}$	$\frac{16}{24}$	$\frac{16}{27}$
Mother	$\frac{1}{6}$	$\frac{4}{24}$	$\frac{4}{27}$
Father	$\frac{1}{6}$	$\frac{4}{24}$	$\frac{4}{27}$

This case is called the Minbariyyah. 'Alī (God be pleased with him) was asked this question while at the pulpit and he gave a spontaneous response elaborating the shares. He said, "Her eighth has become a ninth ($\frac{3}{27}th$)." The issue was given the name of *al-Mas'alah al-Minbariyyah.*

Where a man dies leaving behind 2 germane (full) sisters, 2 uterine sisters and a mother, the allocation and reduction is as follows:

Heir	Orig. Share	Common Den.	Reduced Share
2 Ger. Sisters	$\frac{2}{3}$	$\frac{4}{6}$	$\frac{4}{7}$
2 Ut. Sisters	$\frac{1}{3}$	$\frac{2}{6}$	$\frac{2}{7}$
Mother	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{7}$

Where a man dies leaving behind 2 germane (full) sisters, 2 uterine sisters and a wife, the allocation and reduction is as follows:

Heir	Orig. Share	Common Den.	Reduced Share
2 Ger. Sisters	$\frac{2}{3}$	$\frac{8}{12}$	$\frac{8}{15}$
2 Ut. Sisters	$\frac{1}{3}$	$\frac{4}{12}$	$\frac{4}{15}$
Wife	$\frac{1}{4}$	$\frac{3}{12}$	$\frac{3}{15}$

Where a woman dies leaving behind 1 germane (full) sister, 2 uterine sisters and a husband, the allocation and reduction is as follows:

Heir	Orig. Share	Common Den.	Reduced Share
1 Ger. Sister	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{8}$
2 Ut. Sisters	$\frac{1}{3}$	$\frac{2}{6}$	$\frac{2}{8}$
Husband	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{8}$

Where a man dies leaving behind 2 germane (full) sisters, 2 uterine sisters, a wife and a mother, the allocation and reduction is as follows:

Heir	Orig. Share	Common Den.	Reduced Share
2 Ger. Sisters	$\frac{2}{3}$	$\frac{8}{12}$	$\frac{8}{17}$
2 Ut. Sisters	$\frac{1}{3}$	$\frac{4}{12}$	$\frac{4}{17}$
Wife	$\frac{1}{4}$	$\frac{3}{12}$	$\frac{3}{17}$
Mother	$\frac{1}{6}$	$\frac{2}{12}$	$\frac{2}{17}$

Where a woman dies leaving behind 2 germane (full) sisters, 2 uterine sisters, and a husband, the allocation and reduction is as follows:

Heir	Orig. Share	Common Den.	Reduced Share
2 Ger. Sisters	$\frac{2}{3}$	$\frac{4}{6}$	$\frac{4}{9}$
2 Ut. Sisters	$\frac{1}{3}$	$\frac{2}{6}$	$\frac{2}{9}$
Husband	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{9}$

Where a woman dies leaving behind 2 germane (full) sisters, 2 uterine sisters, a mother and a husband, the allocation and reduction is as follows:

Heir	Orig. Share	Common Den.	Reduced Share
2 Ger. Sisters	$\frac{2}{3}$	$\frac{4}{6}$	$\frac{4}{10}$
2 Ut. Sisters	$\frac{1}{3}$	$\frac{2}{6}$	$\frac{2}{10}$
Husband	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{10}$
Mother	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{10}$

CHAPTER 26

THE SHARES OF GRANDMOTHERS AND GRANDFATHERS

26.1 The Grandmothers

26.1.1 Grandmothers who inherit and those who do not inherit

Every grandmother who is directly linked to a residuary (*'aṣabah*) or a sharer (*ṣāḥib al-farīḍah*) is entitled to be an heir. For example, mother's mother, father's mother, father's mother's mother, mother's mother's mother, father's mother's mother, father's father's mother will all inherit, because a father does not intervene between two mothers in these links. This type of grandmother is called a "true grandmother."

Every grandmother who is not directly linked to a residuary (*'aṣabah*) or a sharer (*ṣāḥib al-farīḍah*) is not entitled to be an heir. A grandmother in whose link to the deceased a father intervenes between two mothers does not inherit. The reason is that the mother's father is not a residuary (*'aṣabah*) nor is he a sharer (*ṣāḥib al-farīḍah*). For example, mother's father's mother cannot inherit, because a father intervenes in the link. This type of grandmother is called a "false grandmother."

26.1.2 The grandmother's share

The grandmother is a sharer. Her share is not mentioned in the Qur'ān, but is established through a well known (*mashhūr*) *sunnah* and the consensus (*ijmā'*) of the Companions (God be pleased with them).

A grandmother alone is entitled to $\frac{1}{6}th$. When there are two at the same level they share the $\frac{1}{6}th$ equally.

26.1.3 The order of inheritance for grandmothers

The grandmother who is closer to the deceased is entitled to the $\frac{1}{6}th$ as compared to the grandmother who is remote, irrespective of the grandmother being from the mother's side or the father's side.

The mother, if present, excludes all the grandmothers by agreement, irrespective of the grandmother being from her side or from the father's side.

The father, if present, does not exclude the grandmother from the mother's side, but he does exclude the grandmother from his own side.

Thus, the father's mother does not inherit in the presence of the father, but the mother's mother does inherit.

26.2 The Grandfathers

26.2.1 The grandfather and his share

The grandfather is one who is linked to the deceased through male relatives without the intervention of a female. Such a grandfather is also called a "true grandfather." Thus, father's father, father's father's father and so on are all true grandfathers. Any other grandfather, like mother's father, is a "false grandfather."

The grandfather stands in the place of the father (see rules for father §24.2), but there are two views in the school as follows:—

1. Abū Ḥanīfah's view: The father's father (grandfather) stands in the place of the father, in his absence. He, thus, excludes all brothers and sisters of the deceased of whatever type. The exception are two cases: (i) Where the deceased leaves behind a husband, a mother and a grandfather; and (ii) Where the deceased leaves behind a wife, a mother and grandfather. In both cases, according to this view, the mother gets $\frac{1}{3}$*rd* of the entire estate. If the father had been present in the case of the grandfather, she would be assigned $\frac{1}{3}$*rd* of the remaining wealth.

2. Abū Yūsuf and Muḥammad: The father's father (grandfather) stands in the place of the father as if the father was participating in the inheritance with the children of the deceased. He excludes uterine brothers and sisters of the deceased, but he does not exclude the germane brothers and sisters with whom he shares like a male participant in the inheritance.

Abū Ḥanīfah's view is the view of the school.

26.2.2 Ordinary cases of the inheritance of the grandfather

The share of the grandfather, like the father, is $\frac{1}{6}$*th*. Consequently, when there is a child among heirs, the share of the grandfather is $\frac{1}{6}$*th*.

When the deceased is survived by a mother, and a grandfather, the mother gets $\frac{1}{3}$*rd*, while the grandfather gets $\frac{2}{3}$*rd*, that is, he takes the remaining as a residuary.

When the deceased leaves behind one daughter and a grandfather, the grandfather gets $\frac{1}{6}th$ as sharer, while the daughter gets $\frac{1}{2}$. The grandfather then takes the remaining $\frac{1}{2}$ as a residuary.

26.2.3 Cases for the grandfather mentioned by Imām Muḥammad

Imām Muḥammad mentioned six cases in the *Book of Farā'iḍ*. These are cases that show the complication of the issue of the grandfather excluding the brothers. A number of Companions did not uphold exclusion of the brothers and sisters by the grandfather, as has been upheld by the Ḥanafī school. The cases are described in subsections below for academic interest.

1. *Al-Khuraqā' (the Tatters):* called so because of excessive disagreement among the Companions (God be pleased with them). It is also called 'Uthmāniyyah and Ḥajjājiyyah. The deceased leaves behind a germane sister (or a consanguine sister), a grandfather and a mother. There are seven views about it from the Companions (God be pleased with them), a few of which are: (i) The mother gets $\frac{1}{3}rd$ and the rest goes to the grandfather. The sister gets nothing. (ii) The mother gets $\frac{1}{3}rd$, the sister $\frac{1}{2}$ as sharer, while the grandfather gets $\frac{1}{6}th$. (iii) The mother gets $\frac{1}{3}rd$, and the rest is shared by the grandfather and the sister in the ratio of two shares for the male and one for the female. (iv) The sister gets $\frac{1}{2}$, the mother $\frac{1}{6}th$ and the rest goes to the grandfather. (v) The estate is shared by them equally. The view of the school is that the sister is excluded by the grandfather, which is the first view.

2. *Akdariyya:* The deceased leaves behind a germane sister (or a consanguine sister), a grandfather, a mother and a husband. There are five views about it from the Companions (God be pleased with them), a few of which are:

   (i) The husband gets $\frac{1}{2}$, mother $\frac{1}{3}rd$, the grandfather $\frac{1}{6}th$, and the sister gets $\frac{1}{2}$. This is then subjected to *'awl* (reduction) as follows:

Heir	Orig. Share	Common Den.	Reduced Share
Ger. Sister	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{9}$
Grandfather	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{9}$
Husband	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{9}$
Mother	$\frac{1}{3}$	$\frac{2}{6}$	$\frac{2}{9}$

(ii) Husband gets $\frac{1}{2}$, mother $\frac{1}{3}rd$, and the remaining goes to the grandfather. (iii) Husband gets $\frac{1}{2}$, mother $\frac{1}{3}rd$ of the remaining, and the rest goes to the grandfather. (iv) Husband $\frac{1}{2}$, sister $\frac{1}{2}$, mother $\frac{1}{6}th$, and grandfather $\frac{1}{2}$. This is then subjected to *'awl* as follows:

Heir	Orig. Share	Common Den.	Reduced Share
Ger. Sister	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{8}$
Grandfather	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{8}$
Husband	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{8}$
Mother	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{8}$

3. The deceased leaves behind a wife, a sister, mother and grandfather. There are four views: (i) wife – $\frac{1}{4}th$, mother $\frac{1}{3}rd$ of what remains, and the remaining for the grandfather. (ii) wife – $\frac{1}{4}th$, mother $\frac{1}{3}rd$ of the entire wealth, and the remaining for the grandfather. (iii) wife – $\frac{1}{4}th$, mother $\frac{1}{3}rd$, and the remaining to be shared by grandfather and sister. (iv) wife – $\frac{1}{4}th$, sister $\frac{1}{2}$, and the remaining to be equally shared by mother grandfather.

4. The deceased leaves behind a husband, a germane (or consanguine) brother, mother and grandfather. There are different views turning upon the exclusion of the brother and whether the mother takes $\frac{1}{3}rd$ of the entire wealth or of what remains after subtracting the share of the husband.

5. The deceased leaves behind a wife, mother, grandfather, and germane (or consanguine) brother. There are five different views on this (not discussed here).

6. Daughter, sister and grandfather. There are five views on this.

26.3 The Method of Radd (Return)

26.3.1 The meaning of *radd* (return)

'Ali (God be pleased with him) said, "When the wealth exceeds the shares of the sharers and there are no residuaries (of any kind) the (additional) wealth is to be returned to the sharers in proportion to their shares, except to the husband and wife." This is the view adopted by the Ḥanafi school as the rule. The husband and wife are denied return as they are not connected through the womb.

It was the view of Zayd ibn al-Thābit that nothing is to be returned to the sharers and the wealth is to be deposited in the *bayt al-māl* (treasury). This view was followed by al-Shāfi'ī.

The implementation of the rule, adopted by the Ḥanafī school, is possible in two ways. The first is the situation when there is no heir to whom a return is not to be made. The second situation is where among the heirs is a person to whom *radd* or "return" is not to be made. The methods for both are explained, but in the final analysis a single method is followed for all situations.

26.3.1.1 THE SITUATION WHERE THE HEIRS DO NOT INCLUDE A PERSON TO WHOM "RETURN" IS DENIED

Two methods are indicated for this situation, as follows:—

(*a*) The first is to allocate the shares to the existing heirs and then to divide the excess among them according to the ratio of their shares, so that the allocation is done twice. If the deceased leaves behind a germane sister and mother. The share of the mother is $\frac{1}{3}$*rd* and that of the sister is $\frac{1}{2}$, that is, 2 and 3 shares respectively out of 6. The first solution is to multiply 5 by 6 arriving at thirty shares, which are divided proportionately among them.

Heir	Orig. Share	Com. Den. 1	Com. Den.2	Incr. Share
Ger. Sister	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{15}{30}$	$\frac{18}{30}$
Mother	$\frac{1}{3}$	$\frac{2}{6}$	$\frac{10}{30}$	$\frac{12}{30}$
	Balance	$\frac{1}{6}$	$\frac{5}{30}$	

When the fractions are reduced to the common denominator of 6, the balance is $\frac{1}{6}$ (shown only for purposes of illustration). It is difficult to split $\frac{1}{6}$ in the ratio of 3:2. The denominator is increased to 30 and this gives the balance $\frac{5}{30}$, which can easily be split into 3:2 and then allocated, as above. The shares in the final column can be reduced to $\frac{3}{5}$ and $\frac{2}{5}$. This is a lengthy method.

(*b*) The second method is to examine the proportion of the shares and to divide the wealth among them through a single allocation. In the example above, the total number of shares are five. The entire wealth is divided into 5 shares and allocated as follows:

Heir	Orig. Share	Com. Den. 1	Inc. Share
Ger. Sister	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{5}$
Mother	$\frac{1}{3}$	$\frac{2}{6}$	$\frac{2}{5}$

The sum of the numerators is 5, therefore, this is made the denominator so as to divide the entire wealth into five parts. The second method is followed by the jurists.

26.3.1.2 THE SITUATION WHERE THE HEIRS INCLUDE A PERSON TO WHOM "RETURN" IS DENIED

In this case too both methods are shown for purposes of illustration, but the second is followed by the jurists:—

(*a*) If a woman leaves behind a husband, mother and daughter, then the husband is entitled to $\frac{1}{4}$*th*, the daughter $\frac{1}{2}$ and the mother $\frac{1}{6}$*th*. One share out of 12 is left, which is $\frac{1}{12}$*th*. This has to be returned to the mother and daughter, but not to the husband. The method is to multiply 12 by 4 giving 48 shares. Out of this 12 are to be given to the husband, 27 to the daughter and 9 to the mother.

Heir	Orig. Share	Com. Den. 1	Com. Den.2	Inc. Share
Husband	$\frac{1}{4}$	$\frac{3}{12}$	$\frac{12}{48}$	
Daughter	$\frac{1}{2}$	$\frac{6}{12}$	$\frac{24}{48}$	$\frac{27}{48}$
Mother	$\frac{1}{6}$	$\frac{2}{12}$	$\frac{8}{48}$	$\frac{9}{48}$
	Balance	$\frac{1}{12}$	$\frac{4}{48}$	

The balance of $\frac{1}{12}$ is difficult to allocate between daughter and mother in the ratio of 3:1, but the balance $\frac{4}{48}$ can easily be allocated to get the increased share.

(*b*) By the second method, the share of the husband is first allocated, and the shares of the daughter and mother are then increased.

Heir	Orig. Share	Com. Den.	Inc. Share	Final share
Husband	$\frac{1}{4}$			$\frac{4}{16}$
Daughter	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{4}$	$\frac{9}{16}$
Mother	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{4}$	$\frac{3}{16}$

The remaining estate is divided into four parts for allocation between the daughter and mother. The daughter is to get 3 shares and the mother 1 share of the remaining after the increased allocation. After allocating to the husband $\frac{3}{4}th$ of the whole estate was left, therefore, we multiply by the shares of the daughter and mother by this fraction to get their shares. These come to $\frac{9}{16}$ and $\frac{3}{16}$, that is, a total of 9+3=12 shares out of sixteen. The remaining 4 belong to the husband. As stated, the second method is preferred by the jurists.

Heir	Orig. Share	Com. Den.	Inc. Share	Final share
Wife	$\frac{1}{8}$			$\frac{4}{32}$
Daughter	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{4}$	$\frac{21}{32}$
Mother	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{4}$	$\frac{7}{32}$

$\frac{3}{4} \times \frac{7}{8} = \frac{21}{32}$; $\frac{1}{4} \times \frac{7}{8} = \frac{7}{32}$. 21+7=28, which leaves 4 shares for the husband, that is, $\frac{4}{32}$.

26.3.2 Illustrative cases of *radd* (return)

Radd (return) is made in the case of seven persons: daughter, son's daughter, mother, grandmother, germane sister, consanguine sister, uterine brother and uterine sister. In the cases encountered, there may be just one heir, two, three or four. These four situations are illustrated below:

26.3.2.1 JUST ONE SHARER

If a person dies leaving behind a daughter and no residuaries, she takes $\frac{1}{2}$ as a sharer and the remaining by *radd* (return). If a person dies leaving behind just his mother, she takes $\frac{1}{3}rd$ as a sharer and the rest by *radd* (return).

26.3.2.2 TWO SHARERS

If a person dies leaving behind a daughter and mother, the distribution is as follows:—

Heir	Orig. Share	Com. Den. 1	Inc. Share
Daughter	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{4}$
Mother	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{1}$

26.3.2.3 THREE SHARERS

If a person dies leaving behind a germane sister, a consanguine sister and a uterine sister, the distribution is as follows:—

Heir	Orig. Share	Com. Den. 1	Inc. Share
G. Sister	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{5}$
Con. Sister	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{5}$
Ut. Sister	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{5}$

26.3.2.4 FOUR SHARERS

If a man dies leaving behind a wife, mother, daughter and son's daughter, the distribution is as follows:—

Heir	Orig. Share	Com. Den.	Inc. Share	Final Share
Wife	$\frac{1}{8}$			$\frac{5}{40}$
Mother	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{5}$	$\frac{7}{40}$
Daughter	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{5}$	$\frac{21}{40}$
Son's Daughter	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{5}$	$\frac{7}{40}$

7+21+7=35, which leaves 5 for the husband, that is, $\frac{5}{40}th$.

CHAPTER 27

THE DISTANT KINDRED OR DHAWŪ 'L-ARḤĀM

27.1 The Different Classes of Distant Kindred

27.1.1 The *dhawū 'l-arḥām* or relations through the womb also called distant kindred

The *dhawū 'l-arḥām* are all those heirs who are neither the *'aṣabāt* (residuaries) or the *aṣḥāb al-farā'iḍ* (sharers). Their entitlement is on the basis of the *raḥm* (womb) that is on the basis of links through female relatives and by standing as substitutes for nearness (*qarābah*).

The Mālikī and Shāfi'ī schools deny inheritance to the distant kindred altogether, although some of their later jurists are inclined to admit them as heirs. The Ḥanafīs and the Ḥanbalīs acknowledge them as heirs. The disagreement is based upon the disagreement among the Companions (God be pleased with them) and their Followers.

There are three methods of allotting shares to the distant kindred: the method of *tanzīl* (representation), the method of the *raḥm* (womb) and the method of *qarābah* (nearness). The Ḥanafī school follows the method of *qarābah*.

27.1.2 Confusion in *fiqh* sources about the classes of distant kindred and priorities

Most of the texts after the famous book known as *Sirājiyyah* (written around 690 A.H.) have relied on this popular source. It is suggested in one commentary that the author of this work was relying on the text (a few pages) written by the learned Alā' al-Dīn al-Samarqandī (d. 539 A.H.). There are very few earlier texts that explain the rules of inheritance clearly. The exceptions are Imām Muḥammad's own writings (which have not been published in full) and the book of the illustrious Imām al-Sarakhsī *al-Mabsūṭ*. Al-Qudūrī (d. 432 A.H) gives short, but very accurate statements about the distant kindred. There are differences between *Sirājiyyah* and *al-Mabsūṭ*, especially with respect to the *dhawū 'l-arḥām*.

The difference between the two sources is mainly on the following two points:—

(*a*) The number of classes of the distant kindred.

(*b*) The priorities within the classes.

The two classifications are stated below and then a reconciliation is attempted.

27.2 Classes of distant kindred and their priorities in the Sirājiyyah

The *Sirājiyyah* divides the *dhawū 'l-arḥām* into four classes, and this classification is then followed in all later books. The classification is:—

(*i*) **The First Class:** This class is linked to the deceased from the descendants, and includes the children of daughters and the children of the daughters of his son.

(*ii*) **The Second Class:** This class is linked to the deceased from the ascendants, and includes the false grandmothers and false grandfathers, like the deceased's mother's father's mother or the deceased's mother's father's mother's mother.

(*iii*) **The Third Class:** This class is linked to the deceased through his parents, and includes the children of the deceased's sisters, the children of the deceased's uterine brothers.

(*iv*) **The Fourth Class:** This class is linked through the grandparents of the deceased, and includes the deceased's paternal aunts, uterine paternal uncles, maternal uncles and maternal aunts.

Additional statement: The text then adds another category of "those who stand in their place." Commentators take this to mean the children of the last class.

Priorities for inheritance: The text states that for purposes of inheritance the priority among the classes is exactly in the order they have been stated above. Further, allocation cannot be made for the next class if there are any members of the prior class. In other terms, the inheritance is exhausted by one class. If there are no heirs in a prior class, allocation is to be made for the next class.

27.2.1 Classification of the distant kindred and their priorities in *al-Mabsūṭ*

Al-Mabsūṭ divides the distant kindred into the following seven categories:—

(*i*) **First Class: The children of the daughters,** that is, the children of the daughters of the deceased or the children of the daughters of the sons of the deceased.

(*ii*) **Second Class: Daughters of brothers and the children of sisters**. The link here is through females. This is the third class in *Sirājiyyah*.

(*iii*) **Third Class: False grandfathers and false grandmothers**. This is the second class in *Sirājiyyah*.

(*iv*) **Fourth Class:** Deceased's father's uterine brother (uncle), aunts (father's germane sister, consanguine sister or uterine sister), maternal aunt (mother's sister), maternal uncle (mother's brother). This is the fourth class in *Sirājiyyah* as well.

(*v*) **Fifth Class:** The children of the above. This appears to be the category mentioned in the additional statement in *Sirājiyyah*.

(*vi*) **Sixth Class:** True grandfather's uterine brother (deceased's father's uncle), father's aunts, father's mother's brother, father's mother's sister. This class is not mentioned in the *Sirājiyyah*. It just goes up one level in the family tree.

(*vii*) **Seventh Class:** The children of the above. This is not mentioned either in the *Sirājiyyah*.

Priorities for inheritance: *Al-Mabsūṭ* relies on the *Ẓāhir al-Riwāyah* for the priorities. It does not say explictly that a prior class must be missing before allocation of inheritance can move to the next, but the discussion does imply such an order for allocation.

27.2.2 Reconciliation between *al-Mabsūṭ* and *Sirājiyyah*

As far as authenticity and reliability are concerned, *al-Qudūrī* and *al-Mabsūṭ* are unmatched in Islamic law. In fact, both have served as mother books for all later books. Some of the statements in *Sirājiyyah* appear to have been taken from *al-Mabsūṭ*.

The first five classes mentioned in *al-Mabsūṭ* correspond to the four classes in *Sirājiyyah* when the additional statement is linked to the fourth class. Classes six and seven can easily be ignored as they are very high up in the order and are less likely to survive the deceased, unless the children in the seventh class are taken into account. *It is, therefore, better* *to follow the earlier jurists and undertake the analysis according to the seven classes in al-Mabsūṭ.*

Al-Mabsūṭ and al-Qudūrī have given a higher priority to the children of sisters and daughters of brothers over the false grandparents. The only disagreement among Abū Ḥanīfah and the Ṣāhibayn is about the mother's father. The Imām A'zam gives higher priority to the maternal grandfather (mother's father) over the daughters of brothers and the children of sisters, while the Ṣahibayn do not. This exception has been interpreted by *Sirājiyyah* to give priority to the whole class. The *Sirājiyyah* has been followed for many centuries in all subsequent manuals of *fiqh*, but this interpretation must be given up and the classification provided in *al-Mabsūṭ* is to be followed, and is followed in this book.

The compartmentalization followed in *Sirājiyyah* may generally be adopted for all the seven classes mentioned, while keeping the following two rules into account:—

(*a*) The children mentioned in class five and class seven cannot be granted inheritance if their *uṣūl* (ancestors) from classes four and six respectively are present.

(*b*) Priority may be given to the classes in the order mentioned, but the exceptions, if any, are to be noted. One such exception in the case of mother's father is mentioned above (will be explained further below).

(5) The rules and elaborations provided in *al-Mabsūṭ* need to be followed for a deeper understanding of *fiqh* and for refining the rules provided in the *Sirājiyyah*. This is the method followed in this book for the part on inheritance.

27.2.3 General rules for all classes of distant kindred

The basis of entitlement is nearness in relationship, which is primarily that of being an agnate, because of which a person can inherit the entire estate. The relative who is closer to the deceased is preferred over the remote. This nearness is judged through levels and is also supported by the strength of the link. Thus, being a child is considered stronger than being the father, even though both are equidistant from the deceased.

There is no disagreement that *radd* (return) is preferred over all the distant kindred. The distant kindred cannot inherit if the estate can be returned to the sharers. Those who do not accept *radd* usually do not give a right to the distant kindred to inherit, for example, the Shāfi'ī school.

The following rules are generally followed by the Hanafī school for the distant kindred to determine qarābah and priority:—

(*a*) If the relationship of two distant kindred is of the same level (degree) depending upon proximity of the union with the deceased, but one of them is the child of a sharer or the child of a residuary, when the competing distant kindred is not, preference is given to the child of the sharer or the child of the residuary as the case may be. Thus, the daughter of the daughter of the son excludes the daughter of the daughter of the daughter, even though the level is the same. The daughter of a daughter is neither a sharer nor a residuary, while the daughter of the son is.

(*b*) If one of these is the child of a sharer while the other is the child of a residuary, they are treated as equals. Thus, the daughter of the brother competing with the daughter of the sister cannot exclude each other.

(*c*) If one of them is nearer than the other, the nearer in degree excludes the more remote, even if the more remote is child of a sharer or the child of a residuary when the one nearer is not. When there is a daughter of a daughter of a daughter competing with the daughter of the daughter of a son of the son, the former is closer to the deceased and excludes the other. Likewise, the daughter of the daughter of a sister is given priority over the daughter of the son of the son of the brother, because the former is closer.

(*d*) Where actual *'uṣūbah* (being an agnate) is equal in level, the one having a stronger link is given priority, like the child of the germane brother over the consanguine. When the level is different, the one nearer is preferred over the more remote.

27.3 The Children of the Daughters: Class I

27.3.1 The first class of distant kindred

The first class of the distant kindred includes the children of the daughter of the deceased and children of the daughter of the son of the deceased.

§4 of the Muslim Family Laws Ordinance, 1961, in violation of the structure of inheritance law in *fiqh*, treats the children of the daughter as residuaries rather than as distant kindred.

Initially all three Imāms agreed upon a common method of allocating shares. Thereafter, Abū Yūsuf changed his opinion to a simpler method. The common method was based upon recognizing where the difference between ascendants occurred. Allocation was to begin first at the point of difference and then move downwards.

27.3.2 The rules of allocation for first class of distant kindred

In the simple case, if the parents are common, or of the same sex, but the heirs differ (into male and female), then the distribution is to be made *per capita* in the ratio of two shares for the male and one for the female. For example, if the deceased leaves behind a daughter's daughter and the son of a daughter, the wealth will be distributed among them by agreement (between all three Imams) as follows:—

Grandparent	Parent	Child	Share
Deceased	Daughter	Daughter	$\frac{1}{3}$
Deceased	Daughter	Son	$\frac{2}{3}$

The parent in both cases is a daughter.

If the grandparents are the same, but parents differ, and so do the children, the distribution will first be based upon what the parents would have inherited. For example, if the deceased leaves behind a daughter of a daughter of a daughter; a son of a daughter of a daughter; a daugher of a son of a daughter; and a son of a son of a daughter.

Grandparent	Daughter	Daughter	Daughter	Daughter
Parent	Daughter	Son	Daughter	Son
Child	Daughter	Daughter	Son	Son

Here the grandparents are the same, but the parents are different. The property will first be allocated among the parents. The two sons and two daughters (all parents) will share the property according to two shares for the male and one for the female. This will give six shares, four for the males and two for the females, that is, $\frac{4}{6}th$ and $\frac{2}{6}th$ respectively. As the sons have two children, a male and a female, and the daughters too have two children, a male and a female, the shares allocated are to be further subdivided according to $\frac{2}{3}$ and $\frac{1}{3}$. This means: $\frac{2}{6} \text{x} \frac{1}{3}$; $\frac{4}{6} \text{x} \frac{1}{3}$; $\frac{2}{6} \text{x} \frac{2}{3}$; and $\frac{4}{6} \text{x} \frac{2}{3}$. The table above will now appear as follows:

Grandparent	Daughter	Daughter	Daughter	Daughter
Parent	Daughter	Son	Daughter	Son
Child	Daughter	Daughter	Son	Son
Share	$\frac{2}{18}$	$\frac{4}{18}$	$\frac{4}{18}$	$\frac{8}{18}$

According to Abū Yūsuf, the division between them will be undertaken directly on the basis of two shares for the male and one for the female. In this case, the wealth will be divided into six shares and divided.

Grandparent	Daughter	Daughter	Daughter	Daughter
Parent	Daughter	Son	Daughter	Son
Child	Daughter	Daughter	Son	Son
Share	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{2}{6}$	$\frac{2}{6}$

If the grandparents, parents and children are all different, the distribution will first be based upon what the grandparents would have inherited. For example, if the deceased leaves behind a daughter of a daughter of a daughter of a daughter; a daughter of a son of a son of a daughter; and a son of a daughter of a son of a daugher.

Great Grandparent	Daughter	Daughter	Daughter	Daughter
Grandparent	Daughter	Son	Son	Daughter
Parent	Daughter	Son	Daughter	Son
Child	Daughter	Daughter	Son	Son

In this case, the division is first among the grandparents, according to two shares for the male and one for the female. Thus the two son grandparents get $\frac{4}{6}th$ and the two daughter grandparents get $\frac{2}{6}th$. This is now divided among their children, that is, the parents above according to two shares for the male and one for the female. This means: $\frac{2}{6} x \frac{1}{3}$; $\frac{4}{6} x \frac{1}{3}$; $\frac{2}{6} x \frac{2}{3}$; and $\frac{4}{6} x \frac{2}{3}$. This is stated as $\frac{2}{18}$; $\frac{8}{18}$; $\frac{4}{18}$; and $\frac{4}{18}$ or $\frac{1}{9}$; $\frac{4}{9}$; $\frac{2}{9}$; and $\frac{2}{9}$. The parents are now grouped according to male and female. The share of the two son parents is $\frac{4}{9}+\frac{2}{9}=\frac{6}{9}$, while that of the female parents is $\frac{1}{9}+\frac{2}{9}=\frac{3}{9}$. The share of the children will be $\frac{3}{9} x \frac{1}{3}=\frac{3}{27}$; $\frac{6}{9} x \frac{1}{3}=\frac{6}{27}$; $\frac{3}{9} x \frac{2}{3}=\frac{6}{27}$; $\frac{6}{9} x \frac{2}{3}=\frac{12}{27}$. This is reflected in the table as follows:—

Great Grandparent	Daughter	Daughter	Daughter	Daughter
Grandparent	Daughter	Son	Son	Daughter
Parent	Daughter	Son	Daughter	Son
Child	Daughter	Daughter	Son	Son
Share	$\frac{3}{27}$	$\frac{6}{27}$	$\frac{6}{27}$	$\frac{12}{27}$
Share	$\frac{1}{9}$	$\frac{2}{9}$	$\frac{2}{9}$	$\frac{4}{9}$

This type of hierarchy is not likely to occur in the present times, but it was possible when people used to get married at early ages. For Abū Yūsuf, the division will be as follows:—

Great Grandparent	Daughter	Daughter	Daughter	Daughter
Grandparent	Daughter	Son	Son	Daughter
Parent	Daughter	Son	Daughter	Son
Child	Daughter	Daughter	Son	Son
Share	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{2}{6}$	$\frac{2}{6}$

27.3.3 Further elaboration of allocation for first class of distant kindred

If there are eight individuals, four of whose grandparents are males, and four whose grandparents are females. They may be treated as two groups and allocations made accordingly. The result is as follows:—

D	D	D	D	D	D	D	D
D	D	D	D	S	S	S	S
D	D	S	S	S	S	D	D
D	S	D	S	S	D	D	S
$\frac{1}{27}$	$\frac{2}{27}$	$\frac{2}{27}$	$\frac{4}{27}$	$\frac{8}{27}$	$\frac{4}{27}$	$\frac{2}{27}$	$\frac{4}{27}$

What if there is a daughter of a daughter of a son of a son with these eight individuals? The answer is that a daughter of a son of a son is a sharer, and the child of a sharer in this case will exclude the rest.

What if there is a daughter of a daughter of a daughter with these eight individuals? The answer is that she is at a higher level than all eight and is entitled to all the wealth.

If in the previous case, there is a male with her, that is, a son of a daughter of a daughter, then the wealth will be shared between them according to two shares for the male and one for the female. The eight will get nothing.

If there is with them someone who is at a higher level like a daughter of a daughter, then the entire wealth will be given to her. If there is a male with her of her own level, they will share in the ratio of two shares for the male for one of the female.

27.3.4 Cases in which the kindred in this class have two links with the deceased

The deceased may leave behind a distant kindred, in this class, who is linked to him through two links.

The deceased may leave behind a daughter of a daughter of a daughter, who is also the daughter of a son of a daughter. This is possible where a man has two daughters and each of them has a daughter. The other may also have a son who marries the daughter of the other. If the union of these two is a daughter, she is the daughter of a daughter of a daughter and also the daughter of the son of a daughter. This daughter, according to Muḥammad, inherits by virtue of both links *per stirpes*. According to Abū Yūsuf she can inherit through both links, but *per capita*. The authentic narration from Abū Ḥanīfah is the same as that of Muḥammad.

If there is another daughter of a daughter of a daughter with the one mentioned in the previous subsection, then according to Abū Yūsuf, the one that has two supporting links gets $\frac{2}{3}rd$ and she is to be treated like two persons for a *per capita* distribution. According to Muḥammad, the distribution is first among the parents, thus, the one with two links will get $\frac{3}{4}th$ of the estate, while the one with a single link will get $\frac{1}{4}th$.

If there is another daughter with her with two links, then according to Abū Yūsuf the estate is divided equally between them. According to Muḥammad, the property is to be divided among the parents and then moves down to each.

27.4 Daughters of Brothers and Children of Sisters: Class II

27.4.1 The second class of distant kindred

The distant kindred in this category are of four types: they are either all of them the children of the germane brother and sister; the children of the consanguine brother and sister; the children of the uterine brother and sister; or they are a combination of these.

In the above categories some of them may be nearer kindred, while others may be remote, or they may be of the same level with reference to the deceased.

When they are at the same level, and one of them is a child of a sharer or residuary, he will be preferred over one who is not the child of a sharer or residuary, because the sharers and residuaries are closer to the deceased under the law. Preference will be on the basis of actual nearness (*qarābah*) or it will be on the basis of legal nearness.

If the kindred are equal with respect to being residuaries or sharers, but some are germane and some consanguine, then according to Abū Yūsuf's later view the division is on the basis of *per capita*. According to Muḥammad, the distribution is to be in relation to the grandparents.

27.4.2 Rules of allocation of shares for the second class of distant kindred when they are from one sub-class

If the deceased leaves behind a son of a sister and a daughter of a brother, when both are germane or consanguine, then according to Abū Yūsuf, the son of the sister gets $\frac{2}{3}$*rd* and the daughter of the brother gets $\frac{1}{3}$*rd*. According to Muḥammad the allocation is reverse of this: the daughter of the brother gets $\frac{2}{3}$*rd*, while the son of the sister gets $\frac{1}{3}$*rd*, that is, he allocates the share to the parents and then passes them on to the children. This is based on the rule in subsection (4) of the previous section.

If both kindred, in the previous example, were uterine, then according to the *Ẓāhir al-Riwāyah*, the estate is shared by them equally. The preference of the male over the female is given due to analogy from the Qur'ānic text that prescribes participation for them.

27.4.3 Rules of allocation of shares for the second class of distant kindred when they are represented by two or more sub-classes

If the kindred under this class are from different sub-classes, like three daughters of brothers of different types—germane, consanguine, and uterine—then according to Abū Yūsuf, the estate passes on to the daughter of the germane brother. This is also the decision of Abū Ḥanīfah. According to Muḥammad, the uterine brother's daughter gets $\frac{1}{6}$*th*, and the remaining belongs to the daughter of the germane brother's daughter, while the consaguine brother's daughter gets nothing.

If the deceased leaves behind three daughters of sisters—germane, consanguine and uterine—then according to Abū Yūsuf, which is also a decision of Abū Ḥanīfah, the estate in its entirety passes on to the germane sister's daughter. According to Muḥammad, the wealth is divided among them on the basis of five shares in all. It is as if he is passing on the estate to the sisters first and then this passes on to the daughters (that is, *per stirpes*).

If the deceased leaves behind a daughter of a germane sister and a son of a germane sister, the wealth is divided among them *per capita*, that is, two shares for the male and one for the female.

27.4.4 Cases in which the kindred in this class have two links with the deceased

The deceased may leave behind a distant kindred, in this class, who is linked to him through two links.

The deceased may leave behind a daughter of a uterine sister and she may at the same time be the daughter of a consanguine brother. This is possible when a man has a uterine sister and a consanguine brother and they are united in marriage, that is, the consanguine brother of this man marries his uterine sister, because there is no *qarābah* between the two.

If the deceased leaves behind the daughter of the uterine sister with a dual link, mentioned above, and another daughter of a consanguine brother, then according to Muḥammad the one who has two relations will get $\frac{1}{6}$*th* on account of the relationship of the mother, and the remaining is shared by them in three shares on a *per capita* basis, the total dividion being through eighteen shares. According to Abū Yūsuf, the entire estate belongs to the one with two links due to the meaning *'uṣūbah* in her.

27.5 Paternal Aunts, Maternal Aunts and Maternal Uncles: Class IV and children

27.5.1 The fourth class of distant kindred

According to the school, paternal aunts are at the level of the paternal uncle, while maternal aunts are at the level of the mother. The rule is that when a female stands in the place of a male, she takes the place of the male at her own level, and she does not take the place of the male who is at a nearer or a more remote level.

When a deceased leaves behind a paternal aunt and a paternal uncle, they are either germane, consanguine or uterine. When the germane is present, the estate belongs entirely to such a paternal uncle, because they are agantes, and there is no share for the *dhawū 'l-arḥām* along with the agnates. Thereafter, those with two links are preferred over those with one.

If the deceased leaves behind paternal aunts—germane, consanguine and uterine—the estate belongs entirely to the germane paternal aunt.

as she is linked to the deceased through two bonds. The same applies to the children of such paternal aunts when some of them are closer in relationship.

If all the paternal uncles and aunts are uterine, the estate is divided among them according to two shares for the male and one for the female. According to a narration from Abū Yūsuf, the wealth is to be divided among them in equal parts due to the similarity of their bond with the deceased, that is, their closeness is linked through the mother.

Where the deceased leaves behind a maternal uncle and maternal aunt, the wealth is divided on a *per capita* basis: two shares for the male and one for the female. According to a narration from Abū Yūsuf, the wealth is to be divided among them in equal parts due to the similarity of their bond with the deceased, that is, their closeness is linked through the mother.

If the deceased leaves behind paternal aunts and maternal aunts and maternal uncles, then the paternal aunts are entitled to $\frac{2}{3}rd$, while the maternal aunts and maternal uncles are together entitled to $\frac{1}{3}rd$, which is further divided on a *per capita basis*. Number does not matter in this case. Thus, if the deceased leaves behind one paternal aunt and ten maternal aunts and uncles, the paternal aunt will get $\frac{2}{3}rd$, while the maternal aunts and maternal uncles will share the $\frac{1}{3}rd$ on a *per capita* basis. The same applies if there are ten paternal aunts and a single maternal aunt: the maternal aunt will get $\frac{1}{3}rd$.

Within the two sides, each having germane, consanguine and uterine members, the general rule is that the person with two bonds (germane) is preferred over those with one bond.

27.5.2 The children of the fourth class of distant kindred

This is the fifth class according to al-Sarakhsī, but is being discussed within the fourth.

If the parents in this class are present, the children are not entitled to inherit. In the absence of the parents, the nearer in degree has priority over the more remote. The jurists talk about one, two or more wombs to determine such nearness in degree.

If the deceased leaves behind a daughter of a maternal aunt, a daughter of a daughter of a maternal aunt, or daughter of a son of a maternal aunt, or a son of a son of a maternal aunt, the estate belongs to the daughter of the maternal aunt, as she is the closest in degree.

If the deceased leaves behind daughters of a paternal aunt along with a son of a maternal aunt, the daughters of the paternal aunt will get $\frac{2}{3}rd$, while the son of the maternal aunt will get $\frac{1}{3}rd$.

Within the maternal and paternal sides, the person with two bonds will get priority over others in his own side. If the deceased leaves behind a daughter of a paternal germane aunt, a daughter of a paternal consanguine aunt, and a daughter of a paternal uterine aunt, the entire estate belongs to the daughter of a paternal germane aunt. The same applies within the maternal category.

27.6 The sixth and seventh classes of distant kindred

The sixth class of distant kindred includes the uncles and aunts of the parents of the deceased. The seventh includes the children of these distant kindred.

These two classes are not being discussed here due to the remoteness of this class of heirs. Such heirs could possibly exist where marriages were arranged at a very early age so that several generations could exist at the same time. Allah knows best.

27.7 False Grandfathers and False Grandmothers: Class III

27.7.1 The third class of distant kindred

The false grandfather is connected to the deceased through a mother, either his own mother or his father's mother and so on. The false grandmother is one in whose link a father intervenes between two mothers.

The nearer in degree excludes the more remote. The nearness in degree is based upon wombs or bodies. The grandfather who is linked to the deceased by one womb is just one and he is the mother's father or the deceased's maternal grandfather. Those who are linked through two wombs or bodies are three: mother's mother's father; mother's father's father; and father's mother's father. Among these is just one false grandmother and she is the mother's father's mother.

27.7.2 The single case mentioned by Imām Muḥammad

According to Imām al-Sarakhsī, only a single case has been mentioned by Imām Muḥammad. If the deceased leaves behind mother's mother's father and father's mother's father, the father's mother's father will get $\frac{2}{3}rd$, while the mother's mother's father will get $\frac{1}{3}rd$. Jurists do discuss other cases too.

27.7.3 The special case of the maternal grandfather (mother's father) and priorities within classes

The maternal grandfather or mother's father is treated differently from the class of false grandparents.

There has been disagreement over whether the mother's father is to be given priority over the first class of distant kindred, namely, the children of daughters and the daughters of the son. The predominant view is that the first class is given priority.

There has been disagreement over whether the mother's father is to be given priority over the second class of distant kindred, namely, the daughters of brothers and the children of sisters. The predominant view is that the second class is given priority.

There is no disagreement that the mother's father has priority over the paternal aunt. It is, however, to be noted that if the deceased leaves behind a mother's father's father and along with him there is a paternal aunt, or a maternal aunt, then according to the school the paternal aunt, or maternal aunt, has priority over the mother's father's father. This amounts to preferring the fourth class over the third class or according to those who deem the false grandfathers to be the second class, the preferring of the fourth class over the second class.

It is for the above reason that al-Sarakhsī has discussed this class in the end, and we have done the same. The conclusion is that this class of distant kindred does not fit neatly into the compatmentalized classes.

CHAPTER 28

MISCELLANEOUS ISSUES IN INHERITANCE

28.1 When the propositus and the heir die one after the other and it is not known who died first

If a propositus and an heir die at the same time—by drowning, in a building collapse, bomb blast or in any other way—and it is not known who died first, one cannot inherit from the other, and the estate of each is to be distributed among the living hiers.

If two germane brothers die by drowning and each one leaves behind a duaghter, the estate of each will pass to his daughter by means of her share and by *radd*.

If a father and a son die by drowning or by burning, and the father leaves behind a father, a daughter and a wife, and the son leaves no one except the same people, then the distribution is as follows: From the estate of the father, the wife will get $\frac{1}{8}th$, the daughter $\frac{1}{2}$, and the remaining will go to the father. In the case of the son, if the wife was the son's mother, then he has left behind a mother, a grandfather and a sister. This is the case of "Tatters" mentioned under the inheritance of the grandfather. If the wife is not the son's mother, then the estate belongs to the grandfather.

If, in the previous case, the son leaves behind a daughter, then the father leaves behind a wife, a daughter, daughter of his son, and grandfather. The wife will get $\frac{1}{8}th$, the daughter $\frac{1}{2}$, the son's daughter $\frac{1}{6}th$, and the remaining will go to the grandfather as a sharer and residuary. The son leaves behind his mother, grandfather, and a sister. The mother will get $\frac{1}{6}th$, the daughter $\frac{1}{2}$, and the remaing will go to the grandfather according to one opinion. The other opinion gives the remaining to the sister and grandfather in equal parts.

If a man and his daughter drown together, and the man leaves behind his father, sister and wife, while the drowned daughter leaves behind her husband, then the man's (father's) estate goes to his wife who will get $\frac{1}{8}th$, daughter $\frac{1}{2}$, and the remaining will go to his father. As for the estate of the daughter, she leaves behind her husband, mother, grandfather, and sister. This issue is the *Akdariyyah* discussed under the inheritance of the grandfather.

28.2 Inheritance with respect to the illegitimate child and the child whose paternity has been denied through li'ān

An illegitimate child, or one whose paternity has been denied through *li'ān*, has no *qarābah* from the father's side; his *qarābah* is only from the mother's side. This is the view of the school. According to other views, the *'aṣabah* of such a child is the *'aṣabah* of the mother. The view of the school is that claiming *'aṣabah* in this case amounts to the negation of a rule established by the text. Thus, the claim that if a child of an imprecated woman dies leaving behind a daughter and a uterine brother, then the daughter gets $\frac{1}{2}$, while the uterine brother gets the remaining, works against the rule of the text, which is that a uterine brother can only inherit when the deceased dies by way of *kalālah*, that is, without child.

It is stated, in the light of the above, that the relationship between the mother and the illegitimate child is that of *walā'*, by virtue of which the mother inherits from such a child. The statement in *al-Ikhtiyār* (4/449; quoted by *Fatāwa 'Ālamgīriyyah* 6/501) is: "The *'aṣabah* of the illegitimate child and the child of the imprecated woman (*mulā'anah*) is that of the *mawālī* of the mother, because he does not have a father, and the Prophet (pbuh) linked the child of the *mulā'anah* to the mother. He is, therefore, like the person who has no *qarābah* from the mother's side. Thus, the *qarābah* (kins) of the mother inherit from him and he inherits from them. If he (the illegitimate child) leaves behind a daughter, mother and the impreeating father, the daughter gets $\frac{1}{2}$, while the mother gets $\frac{1}{6}th$. The remaining is given to them by way of *radd*." It is important to note that inheritance in *walā'* works from lower to the higher, and not from higher to lower.

It is also important to note that the right of inheritance under *walā'* arises when all the other heirs (like sharers and residuaries) are missing. Thus, the illegitimate child cannot inherit from the mother when she has other legitimate children and heirs as that would render the illegitimate child an *'aṣabah* of these heirs, which is denied above. The share of the illegitimate child from a dying mother is consequently not discussed in *fiqh* manuals. The statements in modern codes written during British days have, therefore, to be taken with care. The turn of inheritance of the illegitimate child from the mother, like the *mawlā'* of emancipation, comes after the agnates and sharers, but before the *dhawū 'l-arḥām*.

If the illegitimate children are twins, they are treated as uterine brothers or sisters for purposes of inheritance. This applies to children of the woman subjected to *li'ān*.

If an illegitimate person dies leaving behind a daughter and a mother, then the daughter gets $\frac{1}{2}$, while the mother gets $\frac{1}{6}$*th*. There remaining property reverts to them by way of *radd* (return).

If such a person leaves behind a daughter, a mother and a twin illegitimate brother, the distribution is still like the previous case, because a uterine brother cannot inherit along with his daughter.

If the son of a son of the woman imprecated (subjected to *li'ān*) dies leaving behind a daughter, a mother and an uncle, then according to the school this case is similar to the previous one, and the remaining property will go to the mother and daughter by way of *radd*. The reason is that the uncle is a uterine uncle, who is not his *'aṣabah*.

28.3 A Muslim cannot inherit from a non-Muslim and a non-Muslim cannot inherit from a Muslim

There is no disagreement that a non-Muslim cannot inherit from a Muslim, and according to a majority of the Companions (God be pleased with them), a Muslim cannot inherit from a non-Muslim. This is the view of the school.

Inheritance is a type of *wilāyah*, and *wilāyah* of inheritance of one is not established over the other.

28.4 The estate of the apostate

The wealth of the apostate earned while he was a Muslim is inherited by his Muslim heirs.

His wife inherits from the wealth earned by him as a Muslim if she is a Muslim when the apostate dies. She also inherits if he dies while she is undergoing her waiting period. If her waiting period has terminated or the marriage was not consummated, the wife cannot inherit from the apostate husband.

If the wife became an apostate with her husband, she cannot inherit from him, just as his other apostate relatives cannot inherit from him.

The child inherits the wealth earned by the apostate as a Muslim. A child born within six months of the declaration of apostasy by the father is deemed a Muslim and will inherit from him. There is no inheritance for the child born after six months from the declaration of apostasy by the father.

28.5 Inheritance of the person who kills the propositus

An heir who kills the propositus through unjustified homicide is not entitled to inherit from the propositus. This applies to *qatl 'amd*, *shibh al-'amd* or *qatl khaṭa'*.

If a father hits his child to discipline his child, he cannot inherit from him, and is liable to pay the *ḍamān*, according to Abū Ḥanīfah. According to Abū Yūsuf and Muḥammad, he is not liable to *ḍamān* nor is he depirved of inheritance. They also maintain that a teacher, who disciplines a child with the permission of the father, is not liable for *ḍamān*.

If there are three brothers, and one of them kills their father intentionally, the other two have the right to extract *qiṣāṣ* from him, and the killer has no share in it, because he has no share in iheritance. If one of the remaining two brothers dies, the remaining brother does not have the right to subject the first to *qiṣāṣ* as he has now become an heir to the brother who has died.

28.6 Inheritance of the foetus

The foetus is an heir like all other heirs, if it has been verified that it exists in the womb at the time of the death of the heir, and is then born alive within six months of the death of the father if the marriage subsisted till the time of death, but if it is born after six months it is not entitled to inheritance. If the woman was undergoing her waiting period at the time of death then the foetus is an heir even if it is born after a period of six months, but in less than two years from the time of divorce.

A part of the estate of the deceased equal to the share of one son is withheld and is not subjected to distribution till such time that the child is born.

28.7 Inheritance of the missing person (mafqūd)

The state of the missing person (*mafqūd*) is similar to that of the foetus with respect to its vacillation between its existence and non-existence.

The wealth of the missing person is not to be distributed among his heirs until his death can be verified. Death will be presumed, according to Abū Ḥanīfah, when one hundred and twenty years have passed from the date of the birth of the missing person. The law of the state presumes his death after the passage of four years from the date the missing person went missing.

The share of the missing person in the wealth of another is to be withheld from distribution till his reappearance, the time of presumption of his death, or verification of his death, whichever is earlier.

28.8 Inheritance of a wife divorced during terminal illness (maraḍ al-mawt)

The rule for a woman divorced during terminal illness of the husband, as already stated in the Part on Divorce, is that she is entitled to inheritance if the husband dies during her waiting period irrespective of the form of divorce. She is not entitled to inheritance if the husband dies after the termination of the waiting period or the marriage was not consummated.

If the cause of separation leading to divorce was the sexual advances of another or rape of the woman, she is still entitled to inheritance if the husband dies during the waiting period. If he dies after the end of the waiting period or her marriage was not consummated, she is not entitled to inheritance.

28.9 Inheritance through the contract of muwālāt (friendship)

The contract *muwālāt* is a valid contract.

The contract leads to the right of inheritance when the deceased does not have any relations (*qarābāt*) and a *mawlā'* through emancipation. This means no agnates, sharers, *mawlā'* of emancipation or distant kindred. According to al-Shāfi'ī, the contract is void and cannot lead to inheritance.

The basis for the contract is that if a person, who has no heirs, makes a bequest for his entire wealth to a legatee, the bequest is valid and the estate passes to the legatee. Further, the members of the Dīwān undertake mutual agreements for forming an *'āqilah*; if that is permitted the contract of *muwālāt* should also be permitted.

The distinction between *walā'* resulting from emancipation and *walā'* of *muwālāt* is as follows:—

(*a*) In the *walā'* of emancipation, the higher inherits from the lower (as explained in the case of the illegitimate child above), but in the contract of *muwālāt* inheritance is as agreed upon between the parties; if each wishes to inherit from the other, the contract is valid. The basis of *walā'* of emancipation is the giving of life (to the slave or to the illegitimate child), while in *muwālāt* it is the contract and the conditions stipulated.

(b) *Walā'* of emancipation does not admit of deficiency and cancellation, while the contract of *muwālāt* accepts this. If, however, one party bears the payment of *diyah* or *sulḥ* on behalf of the other, the contract cannot be revoked.

(c) The turn for inheritance through *walā'* of emancipation comes after the agnates and sharers, but before the distant kindred. The turn for inheritance of the *mawlā* through *muwālāt* comes after the *dhawū 'l-arḥām*. If there is anyone from the *dhawū 'l-arḥām* present, the *mawlā'* of *muwālāt* will not get anything.

CHAPTER 29

SHIAH LAW OF INHERITANCE

This chapter is not based upon the original Shiah sources, rather it is based on well known secondary sources, like the well known works of Baillee, Amir Ali and others. A few distinctions are drawn first between Hanafi (Sunni) law and Shiah law, as this will facilitate understanding of the general principles.

29.1 *The main points of distinction between Sunni and Shiah laws of inheritance*

29.1.1 The doctrine of agnatic succession or *ta'ṣīb* repudiated

The Shiahs repudiate in toto the doctrine of *Ta'ṣīb* or agnatic succession. Consequently the paternal relations of the male sex, or what are called *'aṣabāt* proper in Sunni law of inheritance, have no especial privilege, nor are they preferred over the relations connected with the deceased through females.[69] Baillee records a report from Imam Ja'far al-Ṣādiq as follows: The narrator says: "I was directed to ask the Imam Jafer Sadik, on whom be peace, to whom doth the property of a person deceased of right appertain? to his own nearest relation or to his *asbāt*? He replied: 'Verily it belongs to the nearest relation, and as to the *asbāt* or more distant male kindred, Dust in their jaws.' "[70] This rule has consequences as will appear below.

29.1.2 The Ḥanafī doctrine of *'awl* (increase) not recognized by Shiah law

This is understood from the following passage in Baillee:

> If the sharer has an equal in degree who is a sharer also, and the shares are not in excess of the whole estate, it is to be divided according to the shares; and if there is any surplus it returns to them all by reversionary right, unless

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[69] Amir Ali, *Hand-book*, 36.

[70] Neil Baillee, *Digest of Moohummudan Law: Shiah Law* (London: Smith Elder & Co., 1887), 400 (underlining added).

> any of them is excluded by a *ḥajb*, or unless a single one of them is entitled to the surplus by virtue of his connection with the deceased. If there is a deficiency, it falls upon the portion of the daughter or daughters, father, or those who are related by the father to the deceased, and not upon those whose relationship is only through the mother.[71]

This is also recorded by Mulla in §110.

29.1.3 The Shiah law prefers the doctrine of *tanzīl* or representation

It was stated earlier in the part on inheritance that there are three methods of inheritance in certain cases: *tanzīl*; *raḥm*; and *qarābah*. The Shiah school prefers representation over other methods, while the Ḥanafī school prefers *qarābah*. In simple terms, the doctrine means that the heirs will descend into the shoes of the person who was the heir of the deceased when they are linked to the deceased through this person, who is no longer living.

29.1.4 The class known as distant kindred is not acknowledged as a separate class in Shiah law

The *dhawū 'l-arḥām* or the distant kindred are not recognized as a separate category by Shiah law. The impact of this can be seen in some of the rules below, especially in the case of the children of the daughter.

29.1.5 The single daughter can take the entire estate under Shiah law

It was stated above that under Ḥanafī law, when the deceased leaves behind one daughter as the only child, she inherits one-half of the entire estate. The rest of the estate goes to the male relatives on the father's side or the *'aṣabāt*. When there are two or more, they inherit two-thirds of the estate. For example, if a Ḥanafī leaves behind a daughter and a brother, the daughter takes her specified share, that is one-half, and the rest goes to the brother as a residuary or *'aṣabah*. Under the Shiah Law, she takes the whole, one-half as her specified share, and the other by the doctrine of *radd* (return).[72] According to Baillee, the same rule applies when the deceased leaves behind a sister and a paternal uncle, the sister will take the entire estate like the daughter above.[73]

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[71] Baillee, *Moohummudan Law: Shiah Law*, 262.

[72] ibid.;Amir Ali, *Hand-book*, 38.

[73] Baillee, *Moohummudan Law: Shiah Law*, 262.

29.1.6 A daughter's daughter is entitled to inheritance like a daughter under Shiah law

It was stated that children of a daughter are treated as distant kindred under Ḥanafī law, and their turn comes when there are no residuaries, that is, if there are residuaries a daughter's daughter will not get anything. Thus, when a Ḥanafī dies leaving behind a daughter's daughter with a brother's son, the brother's son, as an *'aṣabah*, takes the entire inheritance to the exclusion of the deceased's own grandchild. According to Shiah law, the grand-daughter of the deceased, as a lineal descendant, takes the whole property to the exclusion of the brother's son.[74]

It may be stated here that §4 of the Muslim Family Laws Ordinance, 1961 prefers partially the rule provided under Shiah law insofar as it entitles the daughter of a daughter, or even a son of a daughter, to inherit with the residuaries. In other words, the Ordinance does not consider such children to be distant kindred, as does the Ḥanafī law. The children will stand in the place of their deceased parents.

The position taken by the Shiah law with respect to daughter's children is explained by Baillee as follows:

> With regard to the first, the rule of law is that respect is to be paid to nearness of blood to the deceased. Thus the child of a child cannot inherit with a child whether male or female, in so much that there is no inheritance for a son's son, when there is only a daughter; whilst, when there are several children's children together, the nearer of them always excludes the more remote.[75]

29.1.7 The husband or wife under certain circumstances may be entitled to the entire estate

Amir Ali states this rule as follows:

> When the deceased leaves behind him or her no relation excepting a husband or a wife, who is entitled to succeed by virtue of the *sahab-l-zoujiyat* (matrimony), he or she, as the case may be, takes the entire inheritance, first his or her specific share, and the remainder by Return (*radd*).[76]

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[74] ibid.;Amir Ali, *Hand-book*, 37.

[75] Baillee, *Moohummudan Law: Shiah Law*, 270.

[76] Amir Ali, *Hand-book*, 41.

Nevertheless, Amir Ali adds: "The husband or widow is never excluded from succession. In ancient times the widow did not take by Return, but modern lawyers hold, and it has been decided, that she takes by Return in the absence of all natural heirs."[77]

At the same time it is stated that a childless widow cannot inherit anything from the lands of the deceased husband; she is only to be given the value of trees, houses and buildings, but not the land. This rule is difficult to reconcile with the above rule that wife can take all under certain circumstances. It is for this reason that Baillee attempts to explain it in different ways: "When the wife has had a child by the deceased she inherits out of all that he has left; and if there was no child she takes nothing out of the deceased's land, but her share of the value of the household effects and buildings is to be given her. It has been said, however, that she is to be excluded from nothing except the mansions and dwellings; while Moortuza (may God be pleased with him) has expressed a third opinion to the effect that the land should be valued and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority."[78]

As was stated under the discussion of husband and wife in Ḥanafī law, the shares are doubled to one-half and one-fourth respectively.

29.1.8 The illegitimate child is denied inheritance altogether by Shiah law

Illegitimacy is a bar to succession under Shiah law.[79] Baillee has the following to say: "The *wulud-ooz-zina*, or illegitimate child, has no *nusub* or parentage. Consequently, neither the *zanee*, or he who has unlawfully begotten, nor she who bore him, nor any of their relations, can be his heir, nor has he any title to their succession. His inheritance, therefore, is only for his own children, and on failure of them it goes to the Imam."[80]

It was explained earlier, and in some detail, that Ḥanafī law does not deny inheritance to the illegitimate altogether. It treats such a child as one category of *walā'*, but his turn comes after the distant kindred. The statement in Mulla's Code, §85, that "An illegitimate child is considered to be the child of its mother only, and as such it inherits from its mother and her relations, and they inherit from such a child," is essentially incorrect and does not conform to the position taken by the Ḥanafī law. Mulla relies on Tagore for the statement.

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[77] Amir Ali, *Hand-book*, 43. According to Mulla, this opinion was followed in *Abdul Hamid Khan v. Peare Mirza*, (1935) 10 Luck. 550, the Oudh Court followed Amir ali's opinion. *See* §107. But Mulla gives a conflicting statement in §92 to the effect that the wife will get her prescribed share alone, while the rest will escheat to the Government.

[78] Baillee, *Moohummudan Law: Shiah Law*, 295. *Compare* Mulla, §113.

[79] Amir Ali, *Hand-book*, 48.

[80] Baillee, *Moohummudan Law: Shiah Law*, 305.

In reality, the above statement appears to be based on an earlier report in Shiah law, which has been rejected by Shiah law, and inheritance is denied totally to such a child. Baillee mentions such a report: "According to one report, the mother and her relatives can inherit the property of a *wulud-ooz-zina* in the same way as that of the child of a woman separated from her husband by *li'an*; but this report is now rejected."[81]

29.1.9 Denial of inheritance in the case of intentional homicide alone

According to Amir Ali, "Another cause which excludes from inheritance is homicide. Under the Sunni Law, if one person were to kill another either intentionally or accidentally, he would be excluded from inheriting from the person killed. Under the Shiah Law, the homicide must be intentional and unjudifiable to be a bar to succession."[82]

There are other differences too, but the above should suffice by way of illustration.

29.2 The general principles of Shiah law of inheritance

It has to be admitted at the outset that the Shiah law of inheritance is much more systematic, clean-cut and organized. It is, therefore, relatively easy to understand. In this section we shall list some of the general principles of the Shiah law and that should be enough for a general study. The purpose is not to go into details here.

29.2.1 The classes of heirs in Shiah law

29.2.1.1 CAUSES OF INHERITANCE

First, two causes of inheritance are identified. These are:(1) *naṣab* (lineage; consanguinity) and (2) *sabab* (special cause). Consanguinity means a blood relationship. All relations connected to the deceased by the tie of blood are entitled to share in his inheritance, unless excluded by the operation of some prescribed rules.[83] The various classes arise directly from these causes.

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[81] ibid.

[82] Amir Ali, *Hand-book*, 48.

[83] ibid., 36.

29.2.2 *Naṣab* (consanguinity) gives rise to three classes of heirs

These classes may be understood in terms of the blood link with the deceased or degree. The three classes may be said to be based on a single link, two links and three links, although this may not be true in the case of lineal descendants, that is, children and their children, but it is an easy way to comprehend the structure when we focus on the point of connection.

29.2.2.1 THE FIRST CLASS OF *NAṢAB* CONSISTS OF IMMEDIATE ASCENDANTS AND LINEAL DESCENDANTS

This class consists of the following two groups:

1. **Lineal descendants:** These are the children of the deceased and their children.

2. **Immediate ascendants:** These are the parents of the deceased, that is, the mother and father.

If an heir of this class is present, he or she will exclude the heirs of class II and class III from inheritance, that is, from the classes within the cause of *naṣab*. The members of the two groups in this class succeed together.

29.2.2.2 THE SECOND CLASS OF *NAṢAB* CONSISTS OF ASCENDANTS OF THE SECOND DEGREE PLUS BROTHERS AND SISTERS

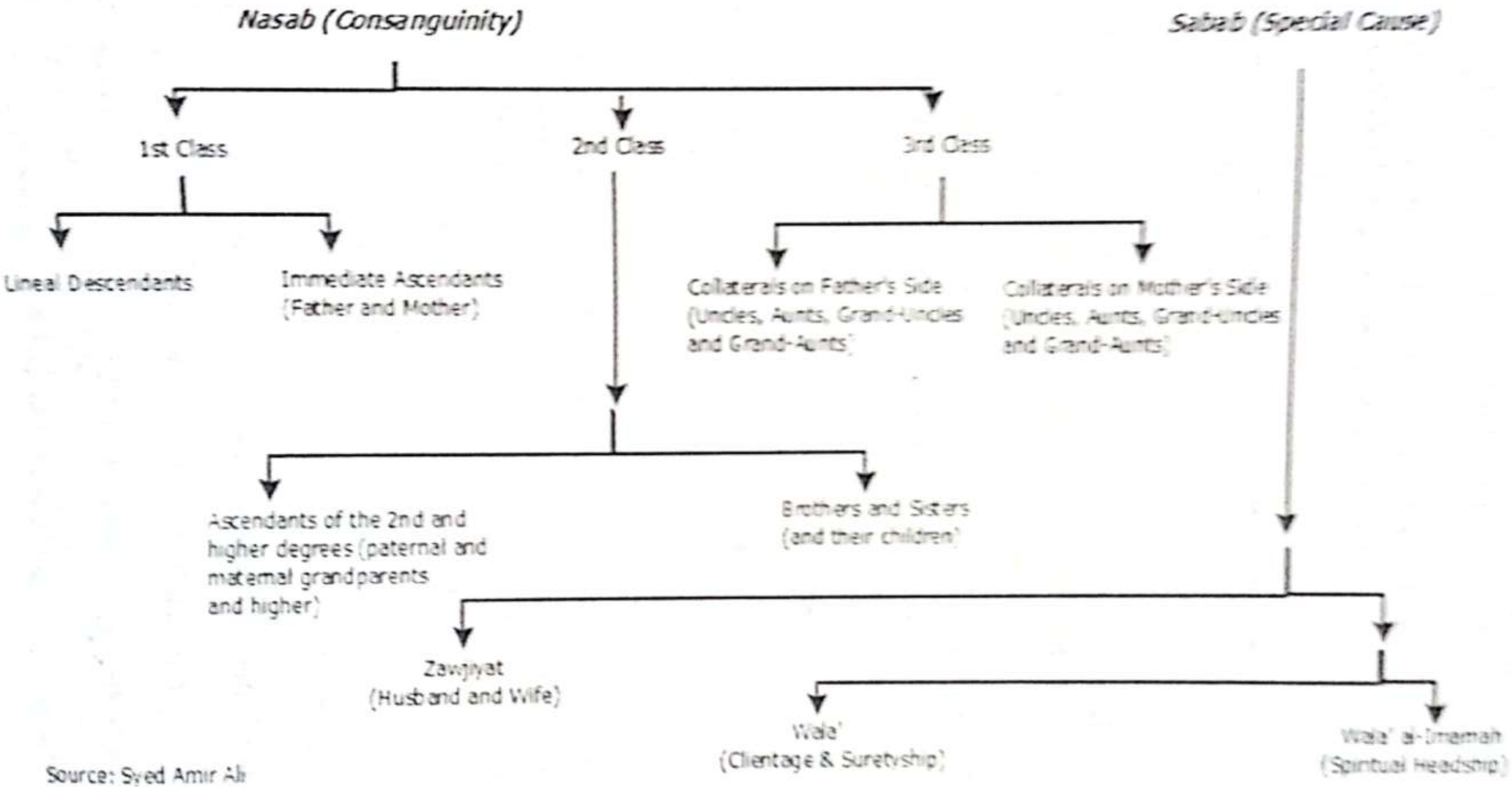
This class consists of the following two groups:

1. **Ascendants of the second degree:** These are the ascendants of two links with the deceased: the paternal and the maternal grandparents. With these ascendants are associated all those who are above them.

2. **Brothers and sisters:** These heirs are linked to the deceased through the mother or the father, that is, two links. The children of brothers and sisters are included in this class.

If an heir of this class is present, he or she will exclude the heirs of class III from inheritance, that is, from the classes within the cause of *naṣab*. If he is present with those of the first class, he will be excluded himself. The members of the two groups in this class succeed together.

Classes of Heirs in Shiah Law of Inheritance


Nasab (Consanguinity)
Sabab (Special Cause)
1st Class
2nd Class
3rd Class
Lineal Descendants
Immediate Ascendants (Father and Mother)
Collaterals on Father's Side (Uncles, Aunts, Grand-Uncles and Grand-Aunts)
Collaterals on Mother's Side (Uncles, Aunts, Grand-Uncles and Grand-Aunts)
Ascendants of the 2nd and higher degrees (paternal and maternal grandparents and higher)
Brothers and Sisters (and their children)
Zawjiyat (Husband and Wife)
Wala' (Clientage & Suretyship)
Wala' al-Imamah (Spiritual Headship)

Source: Syed Amir Ali

29.2.2.3 THE THIRD CLASS OF *NAṢAB* CONSISTS OF COLLATERALS ON THE FATHER'S SIDE AND COLLATERALS ON THE MOTHER'S SIDE

This class consists of the following two groups:

1. **Collaterals on the father's side:** These are the paternal uncles of the deceased, paternal aunts, paternal grand-uncles and grand-aunts.
2. **Collaterals on the mother's side:** These are the maternal uncles of the deceased, maternal aunts, maternal grand-uncles and grand-aunts.

If an heir of this class stands excluded when an heir from the first two classes is present. This is the last class in the category of *naṣab*. The members of the two groups in this class succeed together.

29.2.3 *Sabab* (special cause) gives rise to several classes, but for practical purposes only one is important today

The classes based upon *sabab* or special cause are as follows:

1. **Husband and wife**, that is, whoever survives the other.
2. **The right of inheritance based on walā':** This is of three types pertaining to: freed slaves; compact of paying diyat; *walā'* of the spiritual head.

Out of these, we will discuss the husband and wife alone. It is to be noted that the husband and wife are never excluded from succession. They inherit with the classes falling under the category of *naṣab*.

29.2.4 There are sharers and residuaries in both classes based on *naṣab* and those based on *sabab*

This means that there are persons who have been assigned fixed shares by the texts. These are nine in number:

1. **Husband**: $\frac{1}{4}th$, can be raised to $\frac{1}{2}$ in some cases.
2. **Wife**: $\frac{1}{8}th$, can be raised to $\frac{1}{4}th$ in some cases.
3. **Father**: $\frac{1}{6}th$, can be a residuary in some cases.
4. **Mother**: $\frac{1}{6}th$, can be raised to $\frac{1}{3}rd$ in some cases.

5. **Daughter**: $\frac{1}{2}$, can be a residuary with the son and can take the entire estate in one case. Two of them get $\frac{2}{3}$*rd*

6. **Uterine brother**: $\frac{1}{6}$*th*, when no parent or lineal descendant. Two of them get $\frac{1}{3}$*rd*

7. **Uterine sister**: $\frac{1}{6}$*th*, when no parent or lineal descendant. Two of them get $\frac{1}{3}$*rd*

8. **Full sister**: $\frac{1}{2}$. Residuary with the full brother and also with paternal grandfather. Two of them get $\frac{2}{3}$*rd*

9. **Consanguine sister**: $\frac{1}{2}$. Residuary with the consanguine brother and also with paternal grandfather. Two of them get $\frac{2}{3}$*rd*

Heirs besides the above are all residuaries.

29.3 *Principles of distribution in the three classes*

The distribution of the estate is governed by the structure of the three classes described above. To recapture the rules, we may state that when an heir from the first class is present those in the other two classes cannot inherit, and when there is no one in the first class, but there is an heir in the second class, the members of class III cannot inherit. The husband or wife, as the case may be, cannot be excluded from succession. This is a simple and straightforwad method, which is followed for the distant kindred in the Hanafī school, as described earlier. We may now note the distribution in each class with some illustrations.

29.3.1 Examples of distribution in Class I

29.3.1.1 BASIC RULES

This class has first priority in succession. This class has two groups, which include parents, children and their lineal descendants. The parents inherit with the children or the lineal descendants as the case may be. The husband or wife, as the case may be, will also inherit with these heirs.

The shares of the sharers—father, mother and daughter—are listed in the previous section. The son is a residuary, and the daughter also becomes a residuary with him. The shares of the husband and wife are also listed in the previous section. When there are no children, the children of the children inherit according to the doctrine of *tanzil* (representation) described in the preliminary section. This means they collectively step into the shoes of their parent and divide the share according to the prescribed rules. The doctrine also operates for other lineal descendents. The husband or wife will be alloted his or her share first followed by the other heirs.

29.3.1.2 ILLUSTRATIONS

A few simples illustrations follow:

Where there are no children: If a woman dies leaving behind her husband, mother and father, and there are no children, then the husband will get $\frac{1}{2}$ as sharer, the mother $\frac{1}{3}rd$, and the father will get the remaining $\frac{1}{6}th$ as residuary.

In the above case if the deceased was a man who leaves behind a wife, father and mother, the wife will get $\frac{3}{12}th$, mother $\frac{4}{12}th$, and the father as residuary $\frac{5}{12}th$.

One son with parents: Where a person dies leaving his parents, mother and father, and one son, the father will get $\frac{1}{6}th$ as sharer, mother $\frac{1}{6}th$ as sharer, while the son will take $\frac{2}{3}rd$, that is, the remaining as residuary.

Two daughters with parents: Where a person dies leaving his parents, mother and father, and two daughters, the father will get $\frac{1}{6}th$ as sharer, mother $\frac{1}{6}$ as sharer, while the two daughters will take $\frac{2}{3}rd$ as sharers (not as residuary).

No immediate children only grandchildren: A man dies when leaving behind grandchildren. His own children have all died, that is, they are predeceased. His children who have died were a son-A, a son-B, a daughter-X and a daughter-Y. Son-A died leaving behind a son and a daughter. Son-B died leaving behind a daughter. Daughter-X died leaving behind a son and a daughter. Daughter-Y died leaving behind a son.

This is a complicated case that shows a number of things, as follows:

1. The doctrine of representation will operate, that is, the children will not be considered together giving two shares to each male and one to each female.

2. The grandchildren will step into the position of their parent, that is, they will inherit the share that their parent would have received. They will divide the share of such parent among themselves.

3. Where there is a single child, like a son or a daughter, the child will be entitled to the entire share of his or her parent.

4. When there is a surviving daughter and a son, they will inherit in the ratio of two shares for the male and one for the female.

The following table shows the division of the shares according to the above rules.

Deceased Had The Following						
Predeceased Children	Son–A ($\frac{2}{6}$)		Son–B ($\frac{2}{6}$)	Dtr–X ($\frac{1}{6}$)		Dtr–Y ($\frac{1}{6}$)
Surviving G/children	G/son ($\frac{2}{9}$)	G/Dtr ($\frac{1}{9}$)	G/Dtr ($\frac{2}{6}$)	G/Son ($\frac{1}{9}$)	G/Dtr ($\frac{1}{18}$)	G/Son ($\frac{1}{6}$)
Deceased Has The Above Grandchildren						

29.3.2 Examples of distribution in Class II

29.3.2.1 BASIC RULES

When there are no heirs in the first class, except husband or wife, the entitlement of the heirs of the second class is activated. This class consists of the grandparents (how high soever) and of brothers and sisters and their descendants (how low soever). The details of the distribution may be explained through the following illustrations.

29.3.2.2 ILLUSTRATIONS

Only grandparents, no brothers or sisters: In this case too the doctrine of representation will apply to some extent.

If the deceased leaves behind his father's father and father's mother and also his mother's father and mother's mother. Here these grandparents will first step into the shoes of the father and mother. Thus, the grandparents on the maternal side will get, and then divide, $\frac{1}{3}$*rd* that the mother would have taken, while those on the paternal side will get, and divide, $\frac{2}{3}$*rd* that the father would have taken. The division between the paternal grandparents will be according to the rule: for the male two shares of the female, while the division between the maternal grandparents will be of equal shares.

$\frac{2}{3}$		$\frac{1}{3}$	
father's father	father's mother	mother's father	mother's mother
$\frac{8}{18}$	$\frac{1}{18}$	$\frac{3}{18}$	$\frac{3}{18}$

If there had been one grandparent on the paternal side and one on the maternal, the paternal would have taken the entire $\frac{2}{3}$*rd*, while the one on the maternal side would have taken the entire $\frac{1}{3}$*rd*.

Only brothers and sisters, no grandparents: Full brothers and sisters exclude consanguine brothers and sisters, but the uterine brothers and sisters cannot be excluded.

Husband	$\frac{1}{2}$	As sharer
Full Brother	$\frac{1}{2} x \frac{2}{3} = \frac{1}{3}$	As residuary
Full Sister	$\frac{1}{2} x \frac{1}{3} = \frac{1}{6}$	As residuary

Wife	$\frac{1}{4}$	As sharer
Ut. Brother	$\frac{1}{6}$	As sharer
Cons. Brother	$\frac{7}{12} x \frac{2}{3} = \frac{7}{18}$	As residuary
Full Sister	$\frac{7}{12} x \frac{1}{3} = \frac{7}{36}$	As residuary

Only descendants of brothers and sisters, no grandparents: In this case too the doctrine of representation will apply, that is, the children will step into the shoes of their parents and get what the parents would have taken. The second rule is also the same, that is, descendants of full brothers and sisters exclude descendants of consanguine brothers and sisters, but the descendants of uterine brothers and sisters cannot be excluded. The sharing for children of full and consanguine descendants will be on the basis of two shares for the male.

Husband	$\frac{1}{2}$	As sharer
Ut. brothers's daughter	$\frac{1}{3}$	As sharer
Full brother's daughter	$\frac{1}{6}$	As residuary
Cons. brother's son	nothing	excluded by full b/dtr

Grandparents with brothers and sisters or their descendants: A paternal grandfather will be treated as a full brother or a consanguine brother depending on whether he is sharing with a full sister or a consanguine sister. A maternal grandfather will be treated as a uterine brother. If there are no brothers and sisters, their descendants will step into their shoes on the basis of representation. The maternal grandmother is counted as a uterine sister, while the maternal grandfather as a uterine brother.

Paternal grandfather=full brother	$\frac{2}{3}$
Full sister	$\frac{1}{3}$

Paternal grandfather=cons. brother	$\frac{2}{3}$
Cons. sister	$\frac{1}{3}$

Uterine brother	$\frac{1}{6}$	as sharer
Maternal grandmother	$\frac{1}{6}$	as sharer
2 full sisters	$\frac{2}{3}$	as sharers

uterine brother	$\frac{1}{9}$
uterine sister	$\frac{1}{9}$
mother's mother = uterine sister	$\frac{1}{9}$
father's father = cons. brother	$\frac{1}{3}$
father's mother = cons. sister	$\frac{1}{6}$
cons. sister	$\frac{1}{6}$

29.3.3 Examples of distribution in Class III

If there are no heirs of the first two classes, the heirs of class III will inherit.

29.3.3.1 BASIC RULES

The heirs of the third class are all residuaries (please see table of sharers given in the beginning). The allocation of shares is similar in structure, though not in details, to the distribution among the distant kindred in the Ḥanafi school. The heirs are divided into seven groups in a definite order of priority so that the heirs of the second group cannot inherit if there are heirs in the first group and so on down to the seventh group. The only exception appears to be that the son of a full paternal uncle is given preference over the consanguine paternal uncle. The seven groups are as follows:

1. Paternal and maternal uncles and aunts *of the deceased.*
2. Descendants of the above how low soever with the nearer in degree excluding the more remote.
3. Paternal and maternal uncles and aunts *of the parents of the deceased.*
4. Descendants of the above how low soever with the nearer in degree excluding the more remote.
5. Paternal and maternal uncles and aunts *of the grandparents of the deceased.*
6. Descendants of the above how low soever with the nearer in degree excluding the more remote.

7. Uncles and aunts who are more remote than the above, on the same pattern.

The doctrine of representation operates with the paternal side descending into the shares of the paternal side, and the maternal side descending into the shares of the maternal side.

29.3.3.2 ILLUSTRATION

A single illustration is given below to explain some rules.

Paternal $\frac{2}{3}$			Maternal $\frac{1}{3}$		
full paternal uncle	cons. paternal uncle	uterine paternal uncle	full maternal uncle	cons. maternal uncle	uterine maternal uncle
$\frac{2}{3}x\frac{5}{6}=\frac{5}{9}$	excluded by full paternal uncle	$\frac{2}{3}x\frac{1}{6}=\frac{1}{9}$	$\frac{1}{3}x\frac{5}{6}=\frac{5}{18}$	excluded by full maternal uncle	$\frac{1}{3}x\frac{1}{6}=\frac{1}{9}$

29.4 The doctrine of radd (return) in Shiah law

29.4.1 Doctrine of Return and its exceptions

When the shares allocated to the heirs and the fractions allocated do not form a unity, the shares are increased proportionatley so that the fractions add up to make a unity. The following examples are provided in *Mulla's Code*.[84]

Mother	$\frac{1}{6}$	Increased to $\frac{1}{4}$
Daughter	$\frac{1}{2}=\frac{3}{6}$	Increased to $\frac{3}{4}$
Brother	Nothing	Excluded (belongs to Cl. II)

Mother	$\frac{1}{6}$	Increased to $\frac{1}{5}$
Father	$\frac{1}{6}$	Increased to $\frac{1}{5}$
Daughter	$\frac{1}{2}=\frac{3}{6}$	Increased to $\frac{3}{5}$

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[84] D. F. Mulla, *Mulla's Mahomedan Law*, 18th ed., ed. M. Hidayatullah (Lahore: Mansoor Book House, 1977), §106.

Ut. Sister	$\frac{1}{6}$	Increased to $\frac{1}{4}$
Cons. Sister	$\frac{1}{2}=\frac{3}{6}$	Increased to $\frac{3}{4}$

29.4.2 Exception in the case of husband and wife

The husband or wife as the case may be are not entitled to "return" if there is another heir sharing with them. As already stated, if there is no other heir, the husband or wife will take the entire estate on the basis of "return." It was mentioned, in this context, that an earlier ruling in the school did not permit this for the wife, however, a later ruling of the school was upheld in *Abdul Hamid Khan v. Peare Mirza*[85]

Wife	$\frac{1}{8}$	No Change= $\frac{5}{40}$
Father	$\frac{1}{6}$	Increased to $\frac{1}{5}$ x $\frac{7}{8}$ or $\frac{7}{40}$
Mother	$\frac{1}{6}$	Increased to $\frac{1}{5}$ x $\frac{7}{8}$ or $\frac{7}{40}$
Daughter	$\frac{1}{2}=\frac{3}{6}$	Increased to $\frac{3}{5}$ x $\frac{7}{8}$ or $\frac{21}{40}$

There are some errors in the above example given in Mulla's Code. The calculations have been corrected here.

Husband	$\frac{1}{4}$	No Change= $\frac{4}{16}$
Father	$\frac{1}{6}$	Increased to $\frac{1}{4}$ x $\frac{3}{4}$ or $\frac{3}{16}$
Daughter	$\frac{1}{2}=\frac{3}{6}$	Increased to $\frac{3}{4}$ x $\frac{3}{4}$ or $\frac{9}{16}$

29.4.3 Exception in the case of mother

This is a rare case. When a mother inherits along with a father and daughter, but there are brothers and sisters present, the brothers and sisters will be excluded themselves, but they will prevent the mother from benefiting from the "return."

Mother	$\frac{1}{6}$	No Change= $\frac{4}{24}$
Father	$\frac{1}{6}$	Increased to $\frac{1}{4}$ x $\frac{5}{6}$ or $\frac{5}{24}$
Daughter	$\frac{1}{2}=\frac{3}{6}$	Increased to $\frac{3}{4}$ x $\frac{5}{6}$ or $\frac{15}{24}$
Two full Brs.	Nothing	Excluded

29.4.4 Exception in the case of uterine brothers and sisters

The doctrine of "return" does not apply to uterine brothers and sisters and their shares remain fixed.

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[85] (1935) 10 Luck. 550: 153 I.C. 379: ('35) A.O. 78.

29.5 The doctrine of 'awl (increase) does not apply, but daughters and sisters are affected.

The doctrine of *'awl* (increase) does not apply in Shiah law, but when the fractional shares add up to more than unity, the excess is invariably deducted from the shares of the daughter (or daughters) and full or consanguine sister (or sisters).[86]

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[86] Baillee, *Moohummudan Law: Shiah Law*, 263, 396.

Part VII

THE BOOK OF KUNTHĀ (EUNUCHS) AND THEIR INHERITANCE

CHAPTER 30

THE MEANING OF THE TERM KHUNTHĀ AND THE KHUNTHĀ MUSHKIL

30.1 The meaning of the term khunthā

The term *khunthā* literally means "doubled" or "doubling." The word is applied to the child who is born with both male and female genetalia or with ambiguous genetalia. The words eunuch and hermephrodite are being avoided here, as they can mean different things, and the word *khunthā* will be used to convey the meaning.

The Qur'ān states that it is Allah who gives male children to whom He will and it is Allah who gives female children to whom He will. The Qur'ān does not speak of rules for a person who is both a male and a female. The jurists, therefore, take it as a rule that both attributes cannot be combined in the same person even if the genatalia are ambiguous. The person is either male or female, but it may not be clear to us, due to what we consider to be a congenital defect, as to what is the sex of the person.

Following the above rule, the jurists attempt to assign, to a person with ambiguous genetalia, the rules either of the male or of the female. Where it becomes difficult to assign a rule due to ambiguity, rules based upon caution are adopted.

Whether a person is in reality a male or female is determined by apparent signs. When the child is young, the method is based on identifying the organ from which he or she urinates. This rule is based upon a tradition. As the child grows into puberty, other signs like facial and other hair, appearance of breasts as in females, and menstruation are added to support the conclusion.

The physical tests laid down by the jurists may not be completely accurate all the time. An example is the person suffering from the androgen receptor deficiency where the person is in reality a male (with concealed testes), but has an appearance of a female (who does not menstruate). As this is a concealed matter, unless the person submits to medical examination, the rules laid down by the jurists may be assumed to be generally accurate.

As it is difficult to determine the exact sex of the person in many cases, most of the rules made by the jurists are for the ambiguous case called the *khunthā mushkil.*

30.2 The meaning of khunthā mushkil

When a child is born, the single test for determining sex is the male or female organ. This remains the test till other signs appear with the passage of time.

The causes of ambiguity, when the child is born, may be one of the following:—

(a) The child has both male and female organs. This creates ambiguity and is removed by identifying the organ used for urinating. When the ambiguity cannot be removed even in this way, if both organs are used for urinating, the resulting case is that of ambiguity or *khunta mushkil.*

(b) The organs may be missing altogether or may exist in a form that creates ambiguity, that is, the child neither has a male organ nor a female organ. This becomes an extreme case of an ambiguity or the case of the *khunthā mushkil.*

30.3 Removing the ambiguity through medical science

The jurists have not given final rulings in the case of the *khunthā mushkil.* In fact, Imām Abū Ḥanīfah has expressly said on several occasions, "I do not know," and so did some Companions (God be pleased with them) before him.

The jurists often say, "If it turns out that he is a male," or "If it turns out that she is a female." Statements like these are found for cases where a *khunthā mushkil* dies and his or her body is examined for hair on the chest and other signs, so that burial rites can be performed either by men or by women. In the allocation of shares in inheritance, statements like "If she is considered a female," or "If he is considered a male," are to be found.

To avoid injustice and incorrect treatment, there appears to be no harm if expert medical opinion is sought in cases of the *khunthā mushkil.* An early medical examination, at the request of the parents, or when a national identity card is being issued, may help resolve intricate issues to a great extent. Suitable labels can be used to indicate whether such a person be considered a male or a female, for example intersex (male) or intersex (female).

The illustrations from the law of inheritance for the *khunthā mushkil* highlight the need for medical examination.

30.4 Inheritance where the khunthā is not mushkil

Where it has been clearly determined and declared that a *khunthā* is to be deemed a male or a female, the shares will be allocated like those of males or females as the case may be.

30.5 Examples of inheritance of the khunthā mushkil

The general rule, in the opinion of Abū Ḥanīfah and Muḥammad, is that the *khunthā mushkil* is to be considered a female, unless as a male he will get a lesser share in which case he is to be considered a male. According to Abū Yūsuf, he is to be given one-half share of the male and one-half share of the female. This was the view of al-Sha'bī as well.

A woman dies leaving behind a husband, a germane sister, and a consanguine brother/sister *khunthā mushkil*. In this case, if the *khunthā* is considered a male, he will get nothing, because $\frac{1}{2}$ will go to the husband and $\frac{1}{2}$ will go to the germane sister. If she is considered a female, the husband will get $\frac{1}{2}$, the germane sister will get $\frac{1}{2}$, while the consanguine *khunthā* sister will get $\frac{1}{6}$*th* to complete the $\frac{2}{3}$*rd* for the sisters. The entire distribution will be subjected to *'awl* (reduction), that is, she will get one share out of seven. Consequently, in this case according to Abū Ḥanīfah and Muḥammad, she will be considered a male and he will get nothing. According to Abū Yūsuf, he/she will get $\frac{1}{14}$*th*, which is one-half of her share if she were a female.

If the woman had left behind her husband, her mother, a uterine brother and a germane brother/sister *khunthā mushkil*, then declaring him male would mean $\frac{1}{2}$ for the husband, $\frac{1}{6}$*th* for the mother, $\frac{1}{3}$*rd* for the uterine brother, leaving behind nothing for the *khunthā mushkil*. If she is declared a female, then the distribution by way of *'awl* will be as follows:—

Heir	Orig. Share	Common Den.	Reduced Share
Khuntha Mushkil	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{2}{9}$
Ut. Brother	$\frac{1}{3}$	$\frac{2}{6}$	$\frac{2}{9}$
Husband	$\frac{1}{2}$	$\frac{3}{6}$	$\frac{3}{9}$
Mother	$\frac{1}{6}$	$\frac{1}{6}$	$\frac{1}{9}$

According to Abū Yūsuf, she will get $\frac{3}{15}th$, which is $\frac{1}{2}$ of her share in the above example.

If a man dies leaving behind a child *khunthā mushkil* and other agnates (residuaries), then according to Abū Ḥanīfah and Muḥammd, the *khunthā mushkil* is to be given the share of a female, that is, $\frac{1}{2}$ and the rest will go to the residuaries. According to Abū Yūsuf he/she will get $\frac{3}{4}th$, because he would be entitled to the full estate once and $\frac{1}{2}$ as female, half of which is $\frac{3}{4}th$.

The cases get complicated as we work through the examples given by the jurists, which further emphasises the need for seeking expert medical opinion.

CHAPTER 31

RULES OF RITUALS AND OTHER MATTERS PERTAINING TO THE KHUNTHA

31.1 Rules where the khunthā is not mushkil

Where it has been clearly determined and declared whether a *khunthā* is a male or a female, the person is required to behave in a manner prescribed for males and females with respect to dress and general behaviour. For example, a male cannot wear silk.

All rules regarding blood-money, praying in mosques, wearing of *iḥrām* and other such matters will be applied as they are for other persons.

If the parents arrange the marriage of such a person, the jurists are inclined to consider such a marriage similar to that of an impotent male or of female who suffers from some congential defect that prevents intercourse. The contract is not considered void (*bāṭil*) so as to avoid criminal penalties.

31.2 Rules for the khunthā mushkil

For purposes of burial and burial rites, bathing is avoided by way of precaution, and a form of substitute ablution is performed. The bier is also to be like that of a woman. If a common funeral prayer is held for men and women, the *khunthā mushkil* is to be placed in front of women and behind men.

The person is to avoid wearing silk and jewelry, which are considered *makrūh* for him because the condition of being a woman is not established.

In the case of *iḥrām*, it is preferred if the *kuntha mushkil* adopts the clothing meant for a woman, as it provides a better covering.

In prayer, the *khunthā mushkil* is to adopt the posture of a woman, and if praying in a mosque the prayer is valid if the person stands in the row meant for men that is in front of the rows of women.

If the parents arrange the marriage of such a person, the jurists are inclined to consider such a marriage as *mawqūf* (suspended) till such time that the person attains puberty. The rules of inheritance are not to be applied until his affair is settled. Thereafter, it is considered to be similar to the marriage of an impotent male or of a female who suffers from some congential defect that prevents intercourse. The contract is not considered void (*bāṭil*) so as to avoid criminal penalties.

If a person commits *qadhf* against the *khunthā mushkil*, then there is no penalty of *qadhf* for such a person, as in the case of a woman suffering from a physical defect that prevents intercourse. The *ḥadd* is to be applied once the affair of the *khunthā mushkil* is determined.

If a person (man or woman) chops off his hand prior to his status as male or female being determined, then there is no liability of *qiṣāṣ* for the offender. If he chops of the hand of a man or woman, prior to his determination as male or female, there is no liability for amputation by way of *qiṣāṣ* against the *khunthā mushkil*, until he attains puberty. *Diyah* is imposed on the *'āqilah*.

The *khunthā mushkil* cannot be in a closed space, like a closed room, with someone other than a relative within the prohibited degree. If at all there is a necessity of being alone with someone, it is preferred that he be alone with a woman.

If a *khunthā mushkil* claims that he is a woman, or that he is a man, his statement is not to be accepted until his affair is determined.

The above are some of the rules by way of illustration. The details of the rules are to be found in the individual categories of the law for such persons.

Part VIII

THE BOOK OF *WAṢIYYAH* (BEQUEST OR WILL)

CHAPTER 32

THE MEANING, NATURE AND LEGAL VALIDITY OF BEQUEST (WAṢIYYAH)

32.1 The literal and technical meaning of waṣiyyah (bequest)

The term *waṣiyyah* in its literal sense means "direction," "instruction," and "order." In its technical meaning *waṣiyyah* is a contract by a person about the transfer of ownership to another after the death of the person making the offer.

Bequest is distinguished from sale, hire, and gift as none of these create an obligation after the death of the person. A gift made during death illness does take the rule of *waṣiyyah*, but it is not *waṣiyyah* in reality. The distinction between gift and charity made in health and bequest made in health is that the former are immediately effective and can apply to the entire property, while bequest takes effect after death and applies to one-third of the property, unless the heirs agree.

The testator or legator is called the *mūṣī*, the legatee is called the *mūṣā lahu*, the bequesthed property is called the *mūṣā bihi*, and the testament, bequest or will itself is called the *waṣiyyah*. The executor is called the *waṣī*.

32.2 Waṣiyyah (bequest) applies to wealth existing at the time of death of the testator

Wealth that is the subject-matter of *waṣiyyah* is wealth that is found at the time of the death of the testator and not wealth that existed at the time of making the bequest. If the testator says, "I bequeath a goat from this herd to so and so," then it can be any goat from the herd existing at the time of death of the testator. If the testator bequeaths a third of his property to the legatee, he is entitled to a third of what exists whether less or more.

If the testator identifies a particular property, then the legatee is entitled to that property if it exists upon the death of the testator. If it was destroyed prior to the death of the testator, the bequest lapses, but if it was destroyed in the hands of the heirs after the death of the testator, the heirs must compensate the legatee.

32.3 The legal validity of waṣiyyah (bequest)

Analogy (*qiyās*) denies the permissibility of bequest, because it is the transfer of ownership at a time after death. Ownership is lost with death and its transfer after death is not conceivable.

Waṣiyyah (bequest) is permitted according to the school by way of *istiḥsān*. The *istiḥsān* itself is based upon the Qur'ān, the *Sunnah* and upon *ijmā'* (consensus).

According to *uṣūl al-fiqh*, the legal personality of the deceased (*ahliyyah*) continues to exist in a deficient form till his estate is distributed. Consequently, ownership survives in this weak form till his instructions and obligations are met. The estate is not a legal person under Islamic law, as it is in Roman law.

32.4 Waṣiyyah (bequest) is a recommended act that applies to religious as well as worldly purposes

Waṣiyyah is a contract that is recommended (*mandūb*) and desired, but it is not *farḍ* or *wājib*, that is, obligatory.

The subject-matter of *waṣiyyah* may be the meeting of a religious obligation—like *ḥajj*, *zakāt*, expiation, or the construction of a mosque—or the giving of wealth to an individual. It may also be a combination of both.

When the bequest applies to religious matters alone and the one-third is not sufficient for meeting them, and the heirs have not given approval, the priority is given to *farā'id* first, then to *wājibāt* and thereafter to *nawāfil*. If the purposes are all in a single category, like *farā'iḍ*, the order to be followed is as it has been mentioned by the testator.

When the bequest applies to both religious purposes and the transfer of wealth to human beings, the third is divided *pro-rata* among human beings and religious matters. Within religious matters the same priority is followed as above.

32.5 Where the testator is not rich it is recommended that waṣiyyah pertain to less than one-third of the estate

Where the testator is not rich and the two-thirds of the estate left for the heirs is not sufficient for the needs of the heirs, it is recommended that *waṣiyyah* be for an amount that is less than one-third, say one-fourth or one-fifth.

Where the heirs are rich, there is no harm if a bequest for one-third of the estate is made.

32.6 The waṣī (executor) and his powers

It is recommended that the testator write down his bequest in a deed and also appoint an executor (*waṣī*). The testator may do so when he is departing on a journey, or when he falls ill, or undertaking some other venture with the condition that if he returns or recovers the bequest will stand anulled. He may let the bequest stand if he so likes.

The testator may even appoint two persons to act as his executors, and if one of them dies the *qāḍī* is to appoint another in his place. The two executors will act jointly on all important matters. except for a limited number of things like the preparation of the body of the testator for burial. purchasing necessities for his minor children, the payment of a debt, the return of a deposit, the execution of the bequest regarding a specified property, and the acceptance of a gift. In all other matters, the two persons are to act jointly. This is the view of Abū Ḥanīfah and Muḥammad. Abū Yūsuf said that each one of them can act independently as if the other does not exist.

A non-Muslim or an enemy cannot be appointed as an executor, because the appointment of a *waṣī* is in the nature of *wilāyah* and such persons do not have *wil ah* over Muslims. A Muslim woman can be an executor, and she can appoint an executor too.

A *waṣī* has the right to appoint another *waṣī*, who will act as the executor of this *waṣī* and also of the first testator. Imām al-Shāfi'ī states that he cannot be an executor for the first testator.

The authority of the executor extends to and includes the following acts:—

(*a*) To arrange for the burial of the testator.

(*b*) To pay off his debts.

(*c*) To return the deposits of others if any and to claim all amounts due to the testator.

(*d*) To execute the bequest of the testator whether it pertains to rituals or to the transfer of property.

(*e*) To distribute the remaining estate among the heirs of the testator. He must do so in the presence of all heirs, especially those who are not minors, otherwise the distribution is not valid.

(*f*) To manage the affairs of the heirs if they are minors till such time that they attain majority and manage their own affairs.

(*g*) To preserve the property of the testatator and, if necessary, employ the wealth of the testator in beneficial investments till such time that it is distributed among the heirs.

(*h*) To recover amounts that he may have spent on the minor heirs.

The above is not an exhaustive list.

The *waṣī* may accept his appointment even after the death of the testator, if he did not do so when the testator was alive. Acceptance made prior to the death of the testator, cannot be rejected after the death of the testator, as that will cause harm to the testator.

CHAPTER 33

THE ESSENTIAL ELEMENT OF BEQUEST (WAṢIYYAH) AND ITS CONDITIONS

33.1 The rukn (essential element) of waṣiyyah

The single element of *waṣiyyah*, according to all three jurists, is the *ṣīghah* or form, that is, offer and acceptance. Zufar (God bless him) said that the element is offer alone from the testator and not acceptance.

The three jurists maintain that acceptance on the part of the legatee is necessary as it may sometimes be harmful for him to accept, like the bequest of an invalid or blind slave who cannot work and for whose maintenance the legatee does not have resources.

The offer by the testator for purposes of ritual matters, like the performance of *ḥajj* on behalf of the testator, is directed towards the executor who accepts it as part of his appointment. In other matters the offer is directed at the legatee.

For the performance of *ḥajj*, for example, the executor is to preferably hire a person who has already performed the rites. If he hires a person who will perform the *ḥajj* for the first time, the hiring is valid. This is an issue for the *Book of Ḥajj*.

33.2 Acceptance is valid after the death of the testator

As ownership does not pass to the legatee till after the death of the testator, the time for acceptance by the legatee is after the death of the testator.

According to jurists, the crucial factor in reality is the non-rejection of the offer for purposes of bequest, that is, non-rejection till such time that all expectation of rejection is lost, for example, the testator dies and immediately thereafter the legatee dies too; in such a case, on the basis of *istiḥsān*, ownership stands transferred to the heirs of the legatee. The same applies if the legatee does not come to know of the bequest till he dies. Analogy (*qiyās*) requires the nullification of the bequest leaving the matter to the heirs who may or may not validate it.

33.3 Acceptance must conform to the offer of the testator

Acceptance by the legatee must conform to the offer. If it does not, the essential element is not completed, and the bequest is nullified.

33.4 Conditions for the Testator (Mūṣī)

33.4.1 The testator must possess the legal capacity for donation

The person making the bequest must be a person who possesses the legal capacity for donation (*tabarru'*) when the bequest is about the transfer of property or what relates to property.

The minor and the insane person cannot make a bequest, because donation is an act that causes financial loss and these two persons do not have a legal capacity for doing so. The condition applies even if the minor has been permitted by his *walī* to undertake trade. The testament of a minor about a pure act of nearness to Allah (not involving property) is valid.

33.4.2 The consent of the testator is essential for the validity of the bequest

The consent of the testator is essential, because the offer pertains to transfer of property or what is related to property, therefore, his consent is deemed necessary like all contracts in which property is transferred.

An offer of bequest made in jest, under coercion or by mistake is not valid, as consent is negated in these situations.

33.4.3 Islam is not a condition; a bequest made by non-Muslims is valid

Being a Muslim is not a condition for the validity of the offer of bequest. The bequest of a non-Muslim is valid whether he is a Dhimmī or an enemy provided safe-custody (*musta'min*). If the heir of a *musta'min* is also present in the Dār al-Islām, his bequest is valid up to one-third of his property.

The bequest of a Dhimmī for a Muslim is valid. The bequest of a Dhimmī that *ḥajj* be performed for him or that a mosque be constructed with the wealth will be treated to have been made in jest, and a bequest made in jest is not valid.

33.4.4 If the estate of the testator is not sufficient to cover his debt, his bequest is not valid

If the estate of the testator is completely immersed in debt, his bequest is not valid.

Waṣiyyah has been mentioned prior to debt in the Qur'ān, but that does not give priority to bequests over debts.

33.5 Conditions for the Legatee (*Mūṣā lahū*)

33.5.1 The legatee must exist at the time of bequest; if he does not exist the bequest is not valid

If the legatee does not exist, the bequest is not valid.

Waṣiyyah for a child who has been conceived, though not yet born, is valid if the mother gives birth to the child within six months of the death of the testator according to the Ẓāhir al-Riwāyah. Imām al-Ṭaḥāwī has narrated that the six months are to be reckoned from the time of the bequest.

The distinction between *waṣiyyah* and *hibah* for the unborn child who has been conceived is that in gift possession is required and that is not possible, therefore, it is not valid. In *waṣiyyah* possession is not required.

33.5.2 The legatee must be alive at the time of the death of the testator

The legatee must be living when the testator dies.

A stillbirth within six months of the death of the testator nullifies the *waṣiyyah* made in the child's favour.

If twins are born and one of them was dead at birth, the entire bequest goes to the child who is born alive.

33.5.3 The legatee must not be an heir of the testator at the time of the death of the testator

The legatee must not be an heir of the testator when the testator dies. The bequest is not valid if the legatee is also an heir. The basis for not permitting such a bequest is the damaging of relations amounting to the cutting of the womb.

The condition of being an heir applies at the time of death of the testator and not at the time of making of the bequest. If a person was not an heir at the time of bequest, but turns out to be an heir upon the death of the testator the bequest ceases to be valid. If a man makes a bequest for his brother when at the time he had a son, but the son dies and then the testator dies, the bequest becomes invalid. If he makes a bequest for his brother when he had no son, but a son is born to him after the bequest, the bequest becomes valid.

The bequest becomes valid if the rest of the heirs approve the bequest.

According to the above rules, a bequest for the children of a predeceased son or the children of a daughter is valid. This is what the Egyptian law follows, but it makes it mandatory, which violates the condition of the consent of the testator stated above.

33.5.4 The legatee must not kill the testator through unjustified homicide

The legatee must not be guilty of killing the testator through unjustified homicide. If the homicide is by way of *qiṣāṣ*, the bequest is valid. Imām al-Shāfi'ī agrees with this condition, but Imām Mālik said that bequest for a killer of the testator remains valid.

It is stated in *Kitāb al-Aṣl* that if the heirs approve the bequest for a killer after the death of the testator, the bequest becomes valid. In *al-Ziyādāt* an opinion of Abū Yūsuf is recorded that does not allow such approval.

33.5.5 The legatee must not be an enemy (*ḥarbī*)

The legatee must not be an enemy who is present in the Dār al-Islām. If he is, a bequest made in his favour is not valid.

Neither a Muslim nor a Dhimmī can make a valid bequest for a *ḥarbī*.

A Muslim can make a bequest for a Dhimmī.

33.5.6 A Muslim cannot make a bequest for a synagogue or a church, but a Dhimmī can

A Muslim is not permitted to make a bequest for a synagogue or a church or for promoting the religious rites and ceremonies of non-Muslims.

A Dhimmī is permitted to make a bequest for a synogogue or church, for repair and maintenance, and he can also make a bequest for religious ceremonies and rites. The bequest is limited to one-third of his estate, unless his heirs approve the excess.

33.5.7 The legatee must not be owned by the testator

A testator cannot make a bequest for slaves that he owns when the bequest is of property other than slaves, like *dīnārs* and *dirhams*. He is to be treated as making a bequest for himself in such a case, which is not valid.

If he makes a bequest of one-third of the slave to the slave himself, it is valid, and amounts to emancipation to the extent of one-third. The slave is treated as a *mudabbar* to the extent of one-third, according to Abū Ḥanīfah. According to Abū Yūsuf and Muḥammad, the entire slave becomes a *mudabbar*, who is a slave to be set free upon the death of the master.

On the above analogy, if he bequeaths one third of his entire wealth to the slave without specifying the wealth, it is valid. The jurists enter into complicated calculations to see how much of the property consists of currency and whether the slave attains his freedom with the rest.

This condition does not apply in the present times, due to the absence of slaves.

33.5.8 The object of the bequest must not be uncertain to an extent that the uncertainty cannot be removed

If a bequest is made in a manner that renders the object of the bequest or the legatee unknown or uncertain to an extent that such uncertainty cannot be removed, the bequest is not valid. If the testator bequeaths his property to "One person among the Muslims," the bequest is not valid. If he says, "To one of these two men," the bequest is not valid according to Abū Ḥanīfah. Abū Yūsuf divides the property equally among both, but Muḥammad leaves it to the heirs to choose one of them.

The ambiguity or uncertainty is to be removed insofar as it is possible without altering the nature of the bequest.

33.6 Conditions for the Bequeathed Property (*Mūṣā bihī*)

33.6.1 The object of the bequest must be property or something related to property

The object of the bequest must be property (*māl*) or something related to property. Related to wealth will mean objects like the performance of *ḥajj*, which in turn depend upon wealth.

A bequest of carrion or blood is not valid, because these are not property for anyone. The same applies to animal skins that have not been tanned. Anything that is not *māl* (property) cannot be the subject-matter of *waṣiyyah*.

An important issue under this heading, for the present times, is pure rights, which are not considered *māl* by most jurists including the Ḥanafīs. Pure rights cover intellectual property, which are the most important form of property in modern economies. As suggested earlier, the *ijtihād* undertaken by scholars to legalize them as property suffers from many inadequacies.

Another important issue for modern times is a bequest made for donating body organs like heart, eyes, kidneys and so forth. Blood donation does not relate to bequest, but to gift. The main points for analysing these things will be whether they are carrion, impure, and whether they can be treated like medicine. Further, whether a transplant amounts to consumption of such organs, which is prohibited. The solution will ultimately come to rest on "necessity," as all such issues usually do.

33.6.2 The object of the bequest must be marketable wealth or something related to marketable wealth

The object of the bequest must be marketable property (*māl mutaqawwam*) or something related to marketable property. Thus, wine (*khamr*), which is wealth of sorts so that it can even be inherited, is not marketable wealth for Muslims. It is not to be compensated through damages if it is destroyed, therefore, it cannot be the subject-matter of a bequest for a Muslim. A Dhimmī can make a valid bequest of wine.

A dog trained for hunting is valid subject-matter.

Usufruct, though not strictly *māl* according to the school, can be the subject-matter of a valid bequest. Ibn Abī Laylā rejected the bequest of usufruct.

Bequest of usufruct denies the heirs the use of the property, therefore, it is reckoned on the basis of property and is limited to a third.

If a person, who owns just one house as his entire estate, permits another to live in the house after his death, and the heirs do not permit it, the bequest is void.

If a person, suffering from *maraḍ al-mawt* extends the repayment period of debt owed to him, it is limited to one-third on the above analogy.

33.6.3 The subject-matter of bequest is limited to one-third of the entire estate, unless the heirs permit the excess

The part of the estate that can be the subject-matter of bequest is limited to one-third of the whole.

If the heirs allow it, an excess over one-third also becomes valid.

The distinction between bequest and other forms of donation—like *hibah* and *ṣadaqah*—is that in these forms it is the time of the contract that is taken into account. If the donor was in health, the entire donation is valid, but if he was ill at the time it is not permitted beyond a third. The same applies to emancipation of slaves, writing off debts, forgiving claims arising from *qatl khaṭa'*, and all these operate up to one-third. It is only in the case of pardoning claims arising from *qatl ʿamd* that the entire amount is valid, because *qiṣāṣ* is not wealth.

33.6.4 If there are no heirs, the entire estate can pass to the legatee by way of bequest

The entire estate can pass to the legatee by way of bequest. Imām al-Shāfiʿī maintains that the excess two-thirds passes to the treasury.

The entire estate can also pass to the legatee if there are heirs, and they approve the bequest.

CHAPTER 34

THE LEGAL EFFECTS OF BEQUEST (WAṢIYYAH) AND ITS TERMINATION

34.1 *The Obligation of Waṣiyyah and Revocation of Waṣiyyah*

34.1.1 The legal obligations arising from the contract of *waṣiyyah*

The obligations arising from the contract of *waṣiyyah* (bequest) are of two types: prior to its existence and after its existence.

Prior to its existence a bequest about definitive and other legal obligations (*farḍ* and *wājib*) to be undertaken on behalf of the testator are deemed obligatory. A bequest for what is beyond such obligations is considered recommended, desirable or permitted under certain circumstances. These have been mentioned in the beginning of this book. According to some jurists, bequest in all such cases is deemed obligatory.

After a bequest is made, the *ḥukm* (rule) for this contract is that it is *ghayr lāzim* (terminable), that is, it is possible for the testator to revoke the bequest.

34.1.2 The revocation of *waṣiyyah*

The testator has the right to revoke the bequest as long as he is alive, because what exists prior to his death is just an offer and an offer can be revoked, especially in a contract of donation.

The only exception to revocation in Islamic law is the act of *tadbīr* by means of which a person declares that a certain slave will be free upon his death. Such a slave is called a *mudabbar*. The act of *tadbīr* is *lāzim* (binding) and it cannot be revoked as the slave is already free in part.

Revocation in all other cases is either express or implied. It may also arise out of necessity.

Express revocation is like the testator saying, "Bear witness that the bequest I made in favour of so and so is hereby revoked."

Revocation by implication can take many forms. It can either be through an act or through a statement:—

(*a*) Revocation though an act takes place when the testator undertakes an act with respect to the bequeathed property that alters its nature. For example, he had bequeathed a cloth and he gets a dress made out of it, or he had bequeathed sliver and he turns it into an ornament. All such acts prevent the transfer of ownership in the property.

(*b*) Revocation implied by a statement alters the nature of the bequeathed property in meaning and name resulting in the destruction or consumption of the property in such meaning. Thus, the testator may dispose of the property by way of gift, sale, or takes it out of his ownership in some way. If the testator sells the bequeathed property and then buys it back, or donates the property and then revokes the gift, the bequest cannot be restored and stands revoked as the ownership had been lost and regained ownership will require a new bequest. There are numerous forms of statements that can lead to such revocation and the jurists discuss them in detail.

Revocation by necessity may be in the following two forms:—

(*a*) An excess becomes associated with the bequeathed property and it is not possible to deliver the property without such excess. For example, the testator bequeathed flour but oil gets mixed up with the flour, or he bequeathed a house but then adds to its structure. The property can only be delivered to the legatee at a loss to the heirs. This form is similar to alteration by implication.

(*b*) The property acquires a form to which the original name and meaning cannot be applied, irrespective of the change causing a decrease in the property or an increase. Examples are usually from different types of fruits and grains that have changed their form and become something else, like grapes changing into raisins. All these changes occur prior to the death of the testator.

It is sometimes difficult to distinguish, from the examples mentioned by the jurists, between revocation by implication and revocation by necessity. In the case of necessity, one may conclude that it was not the intention of the testator to alter the thing, that is, revocation was not intended. The jurists consider the overlapping cases to be both of implication and necessity.

34.2 The Legal Effects of Waṣiyyah

34.2.1 The legal effects of *waṣiyyah* in general

Waṣiyyah is of two types: *waṣiyyah* in property and *waṣiyyah* for an act related to property.

Waṣiyyah of property is of two types: bequest of the corpus of the property and bequest of the usufruct of property.

34.2.2 The legal effects of *waṣiyyah* for the corpus of the property

The legal effect of *waṣiyyah* of the corpus of property is that title in the property passes to the legatee upon the death of the testator up to one-third of property.

The transfer of property in this case is similar to transfer in all other transactions like sale, gift, *ṣadaqah* and the like. Consequently, the legatee acquires the full right of disposal of the property and its utilisation.

The transfer of title applies not only to the corpus itself but also to mesne profits, that is, additions that may have taken place, after the death of the testator, either within the corpus or arising from it but separate from the corpus itself. The rule applies whether these additions ocurred prior to acceptance by the legatee or after it. After the acceptance, it is as if these additions ocurred in the legatee's own property. In the case of additions ocurring prior to acceptance, the rule is that ownership stands transferred from the time of the death of the testator.

The corpus and the mesne profits are together subject to the one-third rule. It is as if the additions existed at the time of the contract. There is a disagreement about applying the one-third rule where the additions occur after acceptance but prior to distribution of the estate. Most of the jurists say that the one-third rule will apply on the basis that if part of the estate were destroyed prior to distribution, the corpus itself would be subject to the one-third rule.

Any mesne profits or additions that occurred prior to the death of the testator do not belong to the legatee. Such mesne profits belong to the heirs.

34.2.3 The legal effects of *waṣiyyah* for the usufruct of the property

A *waṣiyyah* for the usufruct or benefits of specified property may be for a limited period or it may be unrestricted with respect to time.

A bequest that assigns the benefits of property to the legatee for a specified period terminates when the period is over. If the corpus of the property was bequeathed to another legatee, ownership in the property passes to such legatee at the end of the period of use. If the corpus of the property was not bequeathed to another ownership passes to the heirs of the testator.

If no period of use was specified by the testator, the period is up to the death of the legatee, after which ownership passes to another legatee, if there is one, otherwise it passes to the heirs of the testator.

The enjoyment of the usufruct is subject to the following restrictions:—

(*a*) Where property was given for personal residence or for personal use, the legatee cannot rent out or lease the property to another. If the property was given so that the legatee may enjoy the rent or revenue of the property, this condition does not apply.

(*b*) In case of moveable property meant for personal use, the legatee cannot move the property to another town unless the family of the legatee lives in such town.

(*c*) In case of any increase in property, like a cow meant for utilisation of the milk gives birth to an offspring, the increase belongs to the heirs or the legatee for the corpus as the case may be.

34.2.4 The legal effects of *waṣiyyah* for an act that entails expenditure or is related to property

A *waṣiyyah* may be made for different types of acts:—

(*a*) The testator may make a bequest for his slave that he will be emancipated upon his death.

(*b*) He may make a bequest for the setting free of a slave after buying the slave.

(*c*) He may make a bequest that a certain amount be spent for financial or charitable purpose.

(*d*) He may make a bequest requiring that certain obligations (definitive and other), and supererogatory acts (*nawāfil*) be performed on his behalf for attaining nearness to Allah. For example, he may require that *ḥajj* be performed on his behalf.

All the above acts are either related to property (like his slave) or they require expenditure in some form.

In the case of a slave who is emancipated, the bequest will apply up to one-third and the slave will be free up to that extent. For the remaining, if any, he will be required to earn and pay off the heirs.

In all other cases, an attempt is to be made to give the fullest effect to the wishes of the testator and to implement the directions as far as possible. The heirs, if they so wish, may make up the difference where required.

34.3 The Termination of the Waṣiyyah (Bequest)

A *waṣiyyah* is annulled on the following grounds:—

(*a*) The revocation (*rujū'*) or cancellation (*faskh*) of the bequest as described above. *Rujū'* of *waṣiyyah* amounts to *faskh*.

(*b*) If the testator becomes permanently and completely insane. This is a period of one month according to Abū Yūsuf, and a period one year according to Muḥammad.

(*c*) The death of the legatee prior to the death of the testator.

(*d*) The destruction of the property bequeathed.

Part IX

RULES COMMON FOR ALL TOPICS

CHAPTER 35

THE IMPACT OF THE MUSLIM FAMILY LAW ORDINANCE, 1961 ON SUNNI LAW

The MFLO not only alters the long established rules of Sunni law, it may also be in conflict with the Constitutiton. The points are collected here in summary fashion. For the details see within the text of the book.

35.1 *The Ordinance clearly states that it overrides Islamic law*

The Constitution requires that no law shall be made that is repugnant to the injunctions of the Qur'ān and the Sunnah. The MFLO was made before the Article 2A was made part of the Constitution, but §3 of the Ordinance clearly states that it will override "any law." It says: "The provisions of this Ordinance shall have effect notwithstanding any law, custom or usage, and the registration of Muslim marriages shall take place only in accordance with these provisions." Is this provision restricting Article 2A? Is an ordinary law restricting superior legislation, which is the Constitution? This is a question that has been raised and will continue to be raised in the future. Another related question is whether the State, especially an Islamic State, has the right to restrict the express provisions of the Qur'ān and the Sunnah? In our view, the State has no jurisdiction over such express provisions, on the basis of the rule: "There is no *ijtihad* in express provisions" (لا اجتهاد مع النصّ).

35.2 *The provision on polygamy (§6) appears to take away a right granted by the sharī'ah*

Section 6 of the Muslim Family Laws Ordinance (VIII of 1961) makes the marriage of a man, who already has a wife or wives, contingent upon the permission of the Aritration Council constituted under the Ordinance. The Council among other things will verify whether permission of the existing wife or wives has been obtained and that the requirements of justice will be met. Section 6(5) provides that a man who contracts another marriage without obtaining the required permission is liable to punishment that may extend to one year simple imprisonment and/or become liable to fine that may extend to five thousand rupees. He will also be liable to pay immediately any amount of dower (of whatever nature) that stands unpaid.

This provision is questionable insofar as it raises the larger issue whether a right expressly given by the *sharī'ah* can be taken away or annulled by the State, or whether an unfettered right granted by the *sharī'ah* can be restricted. It is obvious that the State does not have jurisdiction over rights granted by the *sharī'ah*.

35.3 The Ordinance treats every divorce as a single revocable divorce, thus eliminating the need for an intervening marriage prior to remarriage or of ḥalālah

Section 7 of the Muslim Family Laws Ordinance, 1961 identifies the approved form of divorce (*talāq*) and section 7(6) says that "Nothing shall debar a wife whose marriage has been terminated by *talāq* effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective."

§7 says: "Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talāq* in any form whatsoever…." The words "any form whatsoever" are apparently intended to give liberty to the husband to pronounce divorce in any form he likes, that is, *aḥsan*, *ḥasan* or even the *bid'ah* form, but the other provisions restrict this liberty. This provision appears to restrict divorce to the *aḥsan* (preferred) form. The *ḥasan* (acceptable) and the *bid'ah* (deviant) forms are not recognized by the Ordinance and will, thus, not be enforced, because divorce will be considered a single revocable divorce in all cases. This provision goes against Sunni law insofar as it does not permit the *hasan* form as well as "triple divorce," but it appears to conform with Shi'ah law. Nevertheless, the Ordinance does not explicitly prohibit the forms recognized by traditional Islamic law. Further, the form of divorce cannot really be said to be the *aḥsan* form because the Ordinance is silent about the period of purity, which is an essential condition for such form. As the period of waiting begins to operate from the time of "notice in writing" it becomes irrelevant what form was used by the husband.

As divorce amounts to a single divorce in all cases, remarriage is possible, without an intervening marriage, after the divorce has become effective.

As for the words, "unless such termination is for the third time so effective" they appear to conform to what is called *ṭalāq al-'iddat* in Shiah law, as described by Baillee.[87] A related point is that a divorce once given remains suspended even after *rujū'*, and a subsequent divorce will be counted as a second divorce, that is, it will be added to the earlier divorce. The Ḥanafī jurists do not mention this explicitly, but their rulings indirectly affirm this.

35.4 The Ordinance is silent about the relationship of ṭuhr (period of purity) and divorce

The MFLO is silent about granting divorce in a period of purity. The form prescribed may lead to the granting of divorce during the woman's menses. This will sometimes result in an invalid divorce, according to some, and a deviant (*bid'ah*) form according to most. See the previous section for the relationship of purity to divorce in certain cases.

35.5 The fixed period of ninety days extends the waiting period beyond the true waiting period in certain cases

§7(3) of the Ordinance says: "Save as provided in sub-section (5) *talaq*, unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman." This creates a problem in the case of a woman who menstruates. Ninety days is the maximum period possible in all normal cases, but the normal time for three periods can be anywhere between sixty-five and ninety days according to the jurists. The true waiting period can end much before the ninety day period.

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[87] Baillee says: "The *Tulak-ool-iddut*, or repudiation of the *iddut*, is after the following manner:—A man repudiates his wife under the requisite conditions, he then recalls her before the expiration of the *iddut*, has connubial intercourse with her, and repudiates her again, but in another *toohr* than that in which the intercourse took place, recalls her a second time, has intercourse with her, and repudiates her a third time, but in a subsequent *toohr*. She is now rendered unlawful to him till she has married another husband. Baillee, *Moohummudan Law: Shiah Law*, 119.

As the waiting period is of ninety days, the Ordinance permits reconciliation up to ninety days even when the true waiting period has expired. According to traditional law, retraction (*rujū'*) or reconciliation after the expiry of the true waiting period leads to sin and is not permitted.

35.6 Construing dower as prompt in case of an ambiguity conforms with the provisions of Ḥanafī law

Prompt dower (معجل) : Dower may be prompt that is payable promptly or on demand to the woman if it is so agreed in the marriage contract. If silence is maintained about the time of payment of dower, it will be presumed to be prompt (this rule is affirmed in section 10 of the Muslim Family Laws Ordinance, 1961).

35.7 The Ordinance restricts the absolute right of rujū' granted to the husband by the sharī'ah

The husband has the exclusive right of *rujū'* (retraction of divorce) and *rujū'* does not depend upon the consent of the wife. This requirement has been overturned by the Muslim Family Laws Ordinance, 1961, in which *rujū'* depends upon the consent of the wife supported by her relative as provided by the reconciliation procedure.

35.8 The Ordinance creates a new ground for seeking divorce, which is not recognized by the sharī'ah

Where the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961, the wife has the right to seek divorce. §13 of the Ordinance had created this ground by inserting §2(ii)-a in the Dissolution of Muslim Marriages Act, 1939 (the section itself was omitted through an Ordinance in 1981, but the amendment is not affected). This ground is not recognized in Islamic law. The remedy granted to her by Islamic law is to seek equal justice in treatment. Nevertheless, the Courts have have held this to be a good ground.[88]

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[88] PLD 1984 Pesh. 49; PLD 1968 Dacca 376.

35.9 When the deceased leaves behind a son and daughters and the children of a predeceased son, the children of the predeceased son do not get anything according to traditional law

When the deceased leaves behind immediate children and children of a predeceased son, and there is a son among his immediate children, the children of the predeceased son—whether males alone, females alone, or both combined—do not get anything from the estate as they are excluded by the son.

As for the Shiah law on the issue, Baillee has the following to say:

> With regard to the first, the rule of law is that respect is to be paid to nearness of blood to the deceased. Thus the child of a child cannot inherit with a child whether male or female, in so much that there is no inheritance for a son's son, when there is only a daughter; whilst, when there are several children's children together, the nearer of them always excludes the more remote.[89]

The doctribe of exclusion or *ḥajb* operates in this case. §4 of the Muslim Family Laws Ordinance, 1961 alters this rule. This has been held to be repugnant to the injunctions of Islam by the Federal Shariat Court,[90] but appeal is pending in the Supreme Court, therefore, §4 continues to apply.[91]

35.10 The above rule also applies to consanguine brothers and sisters, but the Ordinance does not alter this rule

The Banū al-'Allāt or the consanguine brothers and sisters inherit like the son's children. This means that in the absence of germane brothers and sisters, the consanguine brothers and sisters stand in their place, just like the children of the son stand in the place of the immediate children in their absence. The males stand in the place of germane males and the females stand in the place of germane females, inheriting like them.

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[89] Baillee, *Moohummudan Law: Shiah Law*, 270.

[90] PLD 2000 FSC 1

[91] 2006 MLD 1138; PLD 2003 SC 475.

They do not inherit when there is a male from the Banū al-A'yān, that is, a male germane. This rule is similar to the children of the son not inheriting when a son is present among the heirs. The Muslim Family Laws Ordinance, 1961 changed the rule for the children of the son, therefore, it needs to change this rule as well for the sake of consistency in *fiqh*.

35.11 *The children of a daughter are treated as distant kindred by Islamic law, but the Ordinance converts them into agnates*

When the deceased leaves behind children of a son and children of a daughter, when the sons and daughters have died, the children of the son stand in the place of the immediate children and inherit accordingly, that is, according to the Qur'ānic rule: "For the male two shares of the female." The children of the daughter do not inherit as they are treated as distant kindred. The first class of the distant kindred includes the children of the daughter of the deceased and children of the daughter of the son of the deceased. This is the rule in Islamic law.

§4 of the Muslim Family Laws Ordinance, 1961, in violation of the structure of inheritance law in *fiqh*, treats the children of the daughter as agnates (*'aṣabāt*) rather than as distant kindred. By granting a share to these heirs the Ordinance partially prefers the rule of the Shiah law of inheritance on the issue. The children, however, stand in the place of their mother and divide her share among them according to the prescribed rules.

Appeal on the decision of the Federal Shariat Court is still pending in the Supreme Court, as stated above.

CHAPTER 36

MARAD AL-MAWT OR THE DEATH ILLNESS

6.1 *The Meaning of Marad al-mawt (Death-illness)*

Marad al-mawt (مرض الموت) called death illness or terminal illness, is in reality "a state of mind" more than it is a real illness. It is a condition in which the mind of a sick person is dominated by the fact that he will die because of his illness. It is of no consequence whether the person actually dies from this illness or from something else. The basis for giving it importance is that in such a state the person may undertake rash or irrational actions that may affect the rights of persons who have a future interest in his property. In this state of mind, the person is also likely to come under the influence of one or more persons who are very close to him at that time, either physically or emotionally.

36.1.1 Conditions for affirming death illness

Two or three conditions must be met before an illness may be declared a death-illness:

- The person suffering from the illness must be convinced that he is approaching death, irrespective of the nature of the disease. Diseases like common colds and headaches, however, are not taken into account for such purposes. Some jurists associate other circumstances with this state, like a person on a ship that is caught in a storm, or like a person facing a death sentence, or even one who is about to engage in mortal combat (or under enemy attack).
- Death should follow such a conviction, even if such death is not caused by the feared illness.
- Some jurists stipulate a third condition here by saying that death must occur within one year of the commencement of illness, because any period above this would mean that the person is accustomed to his illness and that the fear of death is remote.

36.1.2 *Maraḍ al-Mawt* as a Natural Cause of Defective Capacity

Maraḍ al-mawt is listed among the natural causes of defective legal capacity. These are causes that are beyond the control of the subject (*mukallaf*), and result from an act of the Lawgiver and Creator. Under this heading, the jurists list ten causes: *ṣighar* (minority); *junūn* (insanity); *'atah* (idiocy); *nisyān* (forgetfulness); *nawm* (sleep); *ighmā'* (unconsciousness; fainting); *riqq* (slavery); *maraḍ* (illness); *ḥayḍ* (menstruation); *nifās* (puerperium; post-natal state of woman); and *mawt* (death).

According to some jurists *maraḍ al-mawt* has no effect on the capacity for acquisition or on the capacity for execution, and it is in fact a condition of *taklīf*, because it is the capacity to perform an act that is affected here and not the capacity to understand it. This point is debatable when we consider that the basis for framing rules for this condition is that it is the understanding of the person that has become coloured and he is no longer fully capable of rational throught and actions. It is something like the condition of *rushd* (discretion) for the minor who has turned major, a condition that must be fulfilled before the person attaining majority is delivered his wealth.

36.2 The Rules for Maraḍ al-Mawt

A person suffering from such an illness is prohibited from entering into transactions that are in excess of one-third of his wealth. In other words, it takes the *ḥukm* of *waṣīyah*. This condition is stipulated to protect the rights of the heirs. The reason assigned is that the rights of the heirs get linked to the estate as soon as *maraḍ al-mawt* takes hold. The Lawgiver has laid down that such rights are to come into play after the death of the person, but to protect the rights of the heirs and creditors it is assumed that death has already occurred. The justification provided is that the transactions of such a person are not those of one who wishes to live, but of one who is ready to depart.

36.2.1 Types of rights attached to estate in case of death illness

The following rights are attached to the estate of the person suffering from *maraḍ al-mawt*:

- *Rights of creditors.* The creditors have a right prior to all, even if the debts consume all the estate.

- *Rights of beneficiaries.* The rights of beneficiaries restrict the transactions to one-third of the estate, however, amounts in excess of one-third will be valid if permitted by the heirs.

- *Rights of the heirs.* These rights are linked to the estate from the time of the commencement of illness, and any transactions undertaken by the sick person will be assigned certain *aḥkām* (see below).

- *Rights of a woman divorced during death illness.* As stated in the earlier chapters, health is not a condition for divorce, and a divorce pronounced during death-illness is valid. If the divorce was an irrevocable divorce or a divorce pronounced thrice at once, but the husband was ill, the wife is entitled to inheritance upon the death of the husband during the waiting period.

36.2.2 Rules for transactions undertaken during death illness

The transactions may be for a consideration or without a consideration, that is, with a counter-value or without a counter-value.

1. *Transactions with a counter-value.* If the person suffering from death-illness concludes a contract of sale with no apparent loss in it, that is, at the market value, then the creditors or the heirs cannot have it set aside. It is to be assumed that such a sale was undertaken to fulfill his genuine needs and not with the intention to deprive his creditors or heirs. Abū Ḥanīfah maintains that if such a sale is made to one of the heirs, it is to be declared as void even if it is at market value. The two disciples of Abū Ḥanīfah, Abū Yūsuf and al-Shaybānī, maintain that the sale is valid. The difference of opinion is due to the question whether the right of the heirs is linked to the *'ayn* (substance) of the thing or to its value.

2. *Transactions without a counter-value.* If the transaction is a *hibah, waqf, ṣadaqah,* or a sale at less than the market value, or a purchase at more than the market value, then such a transaction will be restricted to one-third of the value of the estate, after the creditors have been satisfied.

36.2.3 Acknowledgement of debts during death illness

Besides transactions, any admission or acknowledgement of debts by the person suffering from *maraḍ al-mawt* (death-illness) may also invoke the rights of creditors and heirs. Al-Shāfi'ī is of the opinion that acknowledgement by a person suffering from death-illness is valid and is not affected by the rights of the creditors or the heirs. The reason he assigns is that a person approaching death would normally tell the truth, even if he is a habitual liar. The Ḥanafīs, on the other hand, make a distinction between two cases:

1. Acknowledgement of debt in favor of an heir: An acknowledgement in favor of an heir can have legal effects if the rest of the heirs permit it. This is due to the apprehension that one heir may have been preferred over the others.
2. Acknowledgement of debt in favor of a stranger: An acknowledgement favoring a stranger is valid. These debts are called *duyūn al-maraḍ* and are to be paid after all other debts, called debts of health, have been satisfied.

36.2.4 Rights of creditors

Three conditions must be fulfilled, before the rights of the creditors can come into play:

1. That the transaction was without a counter-value or without adequate counter-value. This would cover transactions like gift, charity, *waqf,* sale at discount, or purchase at a premium.
2. That the transaction involves the transfer of a thing (*'ayn*), or its corpus, itself and not its use, provided that the benefit conferred through use will terminate upon the death of the owner. Some Ḥanafīs do not consider the benefits arising from the use of a thing as *māl.* The use of land, or of a house, or of an animal are examples that explain this case. The majority (*jumhūr*) consider the use of benefits as *māl.*
3. That the transaction must be in *a'yān* (substance of things) and not in the revenue or profit derived from them. Any assignment of profits arising from a *sharikah* or *muḍārabah* will not be affected by this condition.

36.3 Maraḍ al-mawt and the Bond of Affection

The Mālikīs distinguish between cases where an allegation of a "bond of affection" can be made, that is, where a possibility of undue influence is likely. For example in the case of a wife, close relative, or friend. The basis is the bond existing between them and not the blood relationship. Ibn Rushd has the following to say, when he invokes the principle of *maṣlaḥah* to explain the issue: "The proper methodology of the jurist in this should be to examine the evidence in the circumstances of the case. If such evidence indicates that he (the *marīḍ*) intends betterment through the marriage, he should not prohibit the marriage, but if it indicates that he intends harm to his heirs, he should disallow it.[92]

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[92] Ibn Rushd, *Bidāyat al-Mujtahid*, vol. 2, 35.

CHAPTER 37

GUARDIANSHIP OF PERSON AND PROPERTY

37.1 *Wilāyah is Authority Granted by the Sharīʿah*

Wilāyah (authority), it is of two types: a type that is established by authorization from the owner; and a type that is established by the *sharīʿah*, and not by authorization from the owner or by anyone else. The first is the *wilāyah* (authority) of the agent (*wakīl*), which is delegated authority. The transactions of the agent are executed even though the subject-matter of the transaction is not owned by him, on the basis of the authority derived from the principal.

As for the second type, it is the authority of the father, the grandfather, who is the father of the father, the guardian (*waṣī*), and the authority of the *qāḍī*. The father and the paternal grandfather are the natural guardians. This authority is again of two types: authority for contracting marriage (*nikāḥ*) and authority for all other transactions.

37.1.1 *Wilāyah* over the person or over *nikāḥ*

The authority for contracting *nikāḥ* has already been discussed above within the conditions of marriage, and there is no point in repeating it here.

37.1.2 *Wilāyah* over property or over transactions

As for the authority for transactions other than *nikāḥ*, its discussion is spread over several topics: the explanation of the legal basis for this authority, the elaboration of its conditions, and the identification of the grades of authority.

As for the first, the legal basis for this type of authority is confined to the verification of two things: the first is *ubuwwah* (paternal lineage) and the second is the judicial office (*qaḍāʾ*). The reason is that the paternal grandfather is like the father, but through a link, and the guardian (*waṣī*), appointed by the father and the grandfather, derives his authority from them. All this conceptually belongs to the category of authority of *ubuwwah*. On the other hand, the guardian (*waṣī*) appointed by the *qāḍī* derives his authority from the *qāḍī*, and this would conceptually fall under the *wilāyah* (authority) of the *qāḍī*.

37.2 The rights and liabilities of the child

37.2.1 The Foetus (*Janīn*)

Only some rights are established for the *janīn* (foetus) and no obligations are imposed on it. The reason is that the *janīn* is considered part of the mother in some respects. Thus, it is set free with the slave-mother and is also sold as a part of her. An independent personality is, therefore, not assigned to it. In other respects, the *janīn* enjoys a separate life and is preparing for separation from the womb. Its personality is, therefore, considered deficient or incomplete. By virtue of this deficient capacity, the *janīn* acquires certain rights: freedom from slavery, inheritance, bequest, and parentage. On the other hand, the *janīn* cannot be made liable for the satisfaction of rights owed to others. A purchase made by the would-be *walī* on behalf of the *janīn* cannot make the *janīn* liable for the payment of the price. Likewise, the maintenance of close relatives and the membership of the *'āqilah* cannot be enforced against the *janīn*. Once the child is born, these rights can be enforced against it, but not when the obligations were acquired during the gestation period.

37.2.2 The *Ṣabī* or the Minor

A child possesses a complete capacity for acquisition of rights and obligations, but until a child attains the age of actual or legal puberty, he lacks the capacity for execution. To facilitate matters, this child is made liable by the *sharī'ah* only for those obligations that he can meet. These are listed below:

- Pure financial transactions are established against the *dhimmah* of the *ṣabī*. Though he cannot meet them personally due to the absence of the capacity for execution, the Lawgiver allows his *walī* (guardian) to stand in his place and represent him. The *ṣabī* is also liable for any damage caused to another's property, and for the maintenance of his wives and near relatives. He is also liable, except in the opinion of the Ḥanafī school, for the payment of *zakāt*.

- Criminal liability does not exist in the case of a person who has not attained puberty, because he is not a *mukallaf*, and the *walī* cannot stand in his place for criminal offenses: punishments being deterrents for the offender himself and not for those who represent them. This, however, holds true as far as *ḥudūd* and *qiṣāṣ* penalties are concerned; a child over seven is liable for some minor form of *ta'zīr*.

- The *'ibādāt* are not obligatory on the *ṣabī*, as he does not possess the capacity for execution.

37.3 The Conditions of Wilāyah (Authority)

As for the conditions of *wilāyah*, some of them are relevant to the *walī*, some to the ward, and some to the transactions over which authority is exercised.

37.3.1 Conditions pertaining to the *walī*

The conditions that pertain to the *walī* are several.

1. Among these is that he should be a freeman, as the *wilāyah* of the slave cannot be established.

2. Among these is also the condition that he be sane, and the insane has no authority over others.

3. Among these is also the Islam of the *walī* when the ward is a Muslim. If he is a disbeliever, his authority cannot be established due to the words of the Exalted, "And never will Allah grant to the unbelievers a way (authority) over the believers." [Qur'ān 4 : 141] In addition to this, imposing authority of the disbeliever indicates the degredation of the Muslim, which is not permitted (by the law).

37.3.2 Conditions pertaining to the ward

As for those conditions that pertain to the ward, they comprise minority, and authority over a major cannot be exercised, because he is able to meet his needs on his own. Thus, there is no need to establish someone else's authority over him. The reason for this is that authority over a freeman can be exercised with the existence of negation only due to necessity, and there is no necessity with the existence of ability. It is, therefore, not established.

37.3.3 Conditions pertaining to transactions by the father

The general rule for transactions over which authority is exercised is: that **the transaction should not be injurious to the ward.** This is based on the words of the Prophet (pbuh). "No injury is to be caused and none is to be borne in Islam." The Prophet (pbuh) also said. "One who does not have compassion for our young ones is not one of us." Causing injury to a minor is not part of compassion at all.

37.3.3.1 TRANSACTIONS NOT PERMITTED TO THE FATHER

1. **The *walī* has no authority to gift away the wealth of the minor to another without compensation,** because this is transfer of ownership without compensation and is pure injury. Likewise, it is not permitted to him to gift it away with compensation either according to Abū Ḥanīfah and Abū Yūsuf, but he has this authority according to Muḥammad.

2. **He does not have the right to give away his wealth by way of charity, nor can he make a bequest with it.** The reason is that charity and bequest are transfer of ownership without financial compensation. This amounts to injury and he does not possess this right.

3. **He does not have the right to divorce the ward's wife,** because divorce is a transaction of pure injury.

4. **He does not have the right to emancipate his slave.** Emancipation without compensation is mere injury.

5. **He does not have the right to give his wealth on loan (*qarḍ*),** because *qarḍ* is the transfer of ownership without present compensation. This is the meaning of the statement of the jurists, "*Qarḍ* (loan) is *tabarru'* (donation)." The *walī* does not have the right to make all other kinds of donations, so also this. **He does have the right, however, to sell the wealth of the ward on credit.**

6. **He does not have the right to sell of his property for less than its value to an extent that is considered fraudulent in practice.** If he does sell it for a lower value, his sale is not executed as it is harmful for the ward.

7. **He does not have the right to buy property with his wealth at higher than its market-value to an extent that is deemed fraudulent in practice by the people, as we have said.** If he does buy such property (at a higher value) the sale is executed against him personally, and he will be deemed the person for whom the purchase has been made, because purchase is executed against the buyer.

37.3.3.2 TRANSACTIONS THAT THE FATHER CAN UNDERTAKE

1. **He has the right to accept gifts, charity and bequests on his behalf, because this is a pure benefit accruing to the ward.** The *walī*, therefore, has this authority.

2. **He has the authority to marry away his slave girl, as that brings a benefit.**

3. **He has the authority to sell and buy property for reasonable value.** The value should not be one that would be considered fraudulent by the people.

4. **He has the authority to rent property for him at less than its rental value that is not deemed fraudulent in practice.** If he rents out the ward's personal services or his property, and the minor reaches the age of majority during the rental period, he has an option in the contract for personal services. If he likes he can continue it or he can annul it, but he has no option in the case of the rented property.

5. **He has the right to travel with his wealth, and to give away his wealth on the basis of *muḍārabah*, on the basis of *bidā'ah* (gratis marketing services), or on the basis of agency for sale and purchase** The reason is that these acts fall within the category of trade. Thus, whoever has the authority to trade, has the authority to do all these things.

6. **He has the authority to lend out his property for use (*i'ārah*).** and this is on the basis of *istiḥsān*, though on the basis of analogy this is not permitted.

7. **He has the authority to place his wealth on deposit (*wadī'ah*),** because deposit is also a necessity of trade.

8. **He has the authority to permit him to trade if he has the mental maturity to sell and buy, because the permission to trade is less than trading itself.** Thus, if he possesses the right to trade, possessing the right to permit is evident.

9. **He has the right to conclude a contract of *mukātabah* with his slave,** because *mukātabah* is a commutative contract and falls within the conception of sale.

10. **He also has the right to pledge his property for his debt,** because *rahn* (pledge) is a part of trade.

11. **He has the authority to pledge the ward's property for his own debts,** because the subject-matter of the pledge is in the possession of the pledgee. If, however, it expires, he compensates the amount that was to be paid out of it for his debt.

12. **He has the authority to take his wealth by way of *muḍārabah* himself,** but it is necessary for him to take witnesses to the fact, and if he does not do so, he is entitled to the profit according to what is between him and Allah, but the *qāḍī* will not accept his claim.

13. **Likewise, if he becomes his partner, but his capital is less than the capital of the minor.** If he does take witnesses, the profit is shared as stipulated, but if he does not take witnesses it is lawful for him morally, but the *qāḍī* will not deem him truthful and will allocate the profits in proportion to their capitals employed.

37.3.4 Transactions permitted to the father are permitted to the grandfather and the guardians appointed by them, with some exceptions

What has been stated for the father is also the response for his guardian (*waṣī*) in the father's absence, and also for the grandfather and the guardian appointed by him in his absence. However, there is a difference between the father and his appointed guardian and between the grandfather and the guardian appointed by him in certain special cases. Among these is that when the father or the grandfather buy the property of the minor for themselves or sell their own property to the minor at the value of the property or at less than its value, it is permitted. If the *waṣī* does this, it is not permitted at all according to Muḥammad, but according to Abū Ḥanīfah and Abū Yūsuf it is if this is for the welfare of the minor, otherwise not.